UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MONTGOMERY BLAIR SIBLEY,

PLAINTIFF,

VS.

THE HONORABLE MITCH MCCONNELL, AND THE HONORABLE JOHN A. BOEHNER,

DEFENDANTS.
_____/

Case No.:Case 1:15-cv-00730 (JEB)

PLAINTIFF'S REPLY TO DEFENDANT BOEHNER'S OPPOSITION TO PLAINTIFF'S SECOND MOTION TO REMAND

Plaintiff, Montgomery Blair Sibley ("Sibley"), replies to the Opposition of Defendant Boehner [D.E. #22] to Sibley's Second Motion to Remand, and states as follows:

I. SUMMARY OF ARGUMENT

Sibley withdraws his argument that 28 U.S.C. §1441 is unconstitutional. Congress has given only one option to this Court under §1447(c) upon a finding of lack of subject-matter jurisdiction: Remand. Congress may not, through action of 28 U.S.C. §1442, expand the subject-matter jurisdiction of this Court beyond the boundaries delimited by Article III. Defendants' Rule 12(b)(6) grounds for dismissal are not "threshold" matters which can be considered before determination of this Court's Article III subject-matter jurisdiction.

II. SIBLEY CONCEDES 28 U.S.C. § 1441 IS CONSTITUTIONAL

Upon review of Defendant Boehner's cogent argument and citations to controlling authority in response to Sibley's argument that 28 U.S.C. § 1441 is unconstitutional, Sibley hereby withdraws that argument.

III. §1447(c) GIVES THS COURT ONLY ONE OPTION WHEN LACKING SUBJECT-MATTER JURISDICTION: REMAND

"[T]wo things are necessary to create jurisdiction in an Article III tribunal other than the Supreme Court . . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it." *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151, 392 U.S. App. D.C. 180 (D.C. Cir. 2010). *Accord*: *Kokkonen v. Guardian Life Ins. Co. of* America, 511 U.S. 375, 377 (1994)("Federal courts are courts of limited jurisdiction, possessing only the power conferred by the Constitution and statutes."); *Republic of Venezuela v. Philip Morris Inc*., 287 F.3d 192, 196 (D.C. Cir. 2002)("When it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court must remand the case.")

Defendants concede – indeed argue[1] – that this Court does not have subject-matter jurisdiction. Accordingly, this "inferior court", bound by the rules that Congress has set out for it, must remand the case to the D.C. Superior Court. Congress has left no discretion in this Court to do otherwise by action of 28 U.S.C. §1447(c) which states in pertinent part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, **the case shall be remanded**." (Emphasis added). "Shall" is a verb and, according to Merriam-Webster, is "used to give a command." Here, that Congressional command is to remand.

Notably, contrary to what the Defendants urge, §1447(c) does not say that "if the court can find some other grounds, notwithstanding that it does not have subject-matter jurisdiction, then the

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[1] "The Court should dismiss the Complaint for lack of subject-matter jurisdiction because Plaintiff cannot establish Article III standing to sue." (Def. McConnell's Mot. to Dismiss, p. 3 [D.E. #8-1]; "Speaker Boehner so moves [to dismiss] for the reasons set forth in the Memorandum of Law in Support of Motion to Dismiss of Defendant the Honorable Mitch McConnell" (Def. Boehner's Mot. to Dismiss, p. 1 [D.E. #11].

court can dismiss the case and deprive the plaintiff of resolution in a court with subject-matter jurisdiction."

In response, Defendant Boehner disingenuously, cites *Rangel v. Boehner*, 785 F. 3d 19, 22 (D.C. Cir. 2015) for the proposition that: "the D.C. Circuit emphasized that dismissal on Speech or Debate Clause grounds is appropriate, without consideration of other threshold issues, where (as here) a plaintiff seeks declaratory and injunctive relief as to a matter the Constitution entrusts to the Legislative Branch." (Boehner Opp., p. 4, [D.E.#22]). *Rangel* was not a removed case but instead was filed in this Court hence §1447(c) was not at issue. Rangel challenged his censure as a violation of the House Rules and the Fifth Amendment Due Process Clause. The Honorable Judge Bates dismissed Rangel's complaint, concluding that Rangel lacked Article III "standing" and gratuitously went on to find that: (1) the complaint presented a nonjusticiable political question and (2) the defendants were immune from suit under the Speech or Debate Clause.

On appeal, the D.C. Circuit Court of Appeal invoked an appellate-review doctrine which allowed the Circuit Court to address the grounds for dismissal "in any order" and that Court choose to "begin and end with the simplest ground to affirm the district court: the Speech or Debate Clause." *Id.* Thus, it was only a matter of appellate convenience, not remand case law, which authorized affirming dismissal upon the Speech or Debate Clause rather than "standing". Indeed, the Circuit Court concluded: "We affirm the district court's decision on [Speech or Debate Clause] ground and have no call to consider the other defects it found in Rangel's complaint". Thus, for Defendant Boehner to conflate that appellate rule of convenience cited in *Rangel* to authorize this Court to ignore its §1447(c) duty to remand is simply fatuous.

Defendant Boehner then urges: "This Court may, and should, select Speaker Boehner and

Majority Leader McConnell's Speech or Debate Clause defense as the threshold basis on which to dismiss Mr. Sibley's claims." In support, Defendant Boehner cites *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586-87 (1999), for the proposition that: "This Court has the discretion to decide Defendants' dismissal motions before Mr. Sibley's Remand Motion."

Nothing could be farther from the truth. In *Ruhrgas*, the Supreme Court allowed a determination to remand upon personal jurisdiction grounds rather than upon subject-matter jurisdiction grounds. "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." *Id.*

Thus, the abandonment of the consideration of subject-matter jurisdiction first was only authorized by *Ruhrgas* when the subject-matter jurisdiction question "raises a difficult and novel question." Here, no such "difficult and novel question" is presented this Court: All parties agree that Sibley's lack of "standing" precludes subject-matter jurisdiction in this Article III court. Moreover, lack of personal jurisdiction is not at issue in this case as it has not been raised by the Defendants as a ground for dismissal. Accordingly, *Ruhrgas* cannot be expanded to argue that this Court may address the Speech or Debate Clause argument prior to making its subject-matter jurisdiction determination as the Speech or Debate clause is not a jurisdictional question..[2]

Patently, Defendants' Speech or Debate Clause is an affirmative defense and not a

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[2] "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,'" 523 U.S. at 94-95 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)); for "jurisdiction is power to declare the law," and "'without jurisdiction the court cannot proceed at all in any cause,'" 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. 506,(1869))" *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).

"threshold" jurisdictional issue. Rather, the Speech or Debate Clause argument is an affirmative immunity defense which must be raised under Rule 12(b)(6)[3]. *Powell v. McCormack*, 395 U.S. 486, 506, f/n #25 (1969)("A Congressman is not by virtue of the Speech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the trial court must still determine the applicability of the clause to plaintiff's action.")

This characterization of the Speech or Debate Clause as an affirmative, immunity defense is well-ground in law *Accord*: *Davis v. Passman*, 442 U.S. 228, 246 (1979)("The Court also was persuaded that the special concerns which would ordinarily militate against allowing recovery from a legislator were fully reflected in **respondent's affirmative defense based on the Speech or Debate Clause** of the Constitution."); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)("It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), that legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove, supra*, 341 U.S., at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."); *Green v James,* 473 F2d 660 (9th Cir. 1973)("Absolute immunity like other affirmative defenses must be pleaded and proved by party asserting defense."); *Yellen v. Cooper*, 828 F.2d 1471(10th Cir. 1987)("Waiver, like immunity, is an affirmative defense which must be affirmatively pleaded. Fed. R. Civ. P. 8(c); *accord Pan Am. Bank v. The Oil Screw Denise*, 613 F.2d 599, 602 (5th Cir. 1980); *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254, 255 (8th

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[3] *Kivisto v. Soifer*, 587 Fed. Appx. 522, 524, 2014 U.S. App. LEXIS 17856 (11th Cir. Fla. 2014)("The district court may dismiss a complaint with prejudice on the basis of the immunity defense if a Rule 12(b)(6) motion demonstrates that the complaint, with all of its allegations accepted as true, indisputably establishes the factual foundation of the defense.");

Cir. 1977).")

As such, lacking subject-matter jurisdiction and constrained in it powers by §1447(c), this Court must expeditiously remand the matter to the D.C. Superior Court.

IV. CONGRESS CANNOT EXTEND THE BOUNDARIES OF AN ARTICLE III COURT

Finally, Defendants argue that Congress, by enacting of 28 U.S.C. §1442, has expanded this Court's subject-matter jurisdiction beyond the boundaries delimited by Article III. Such an argument has no footing in the jurisprudence of the United States. It is fundamental that Congress cannot expand the jurisdiction of the federal courts beyond the bounds of Article III. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803):

> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. . . .If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

In opposition to this organic principle of law, Defendant Boehner primarily relies upon *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) and and a recitation of the providence of §1442 to conclude that "this Court may properly dismiss this action for lack of jurisdiction, in accordance with the authority of district courts to do so since at least 1875." A considered review of these authorities compels the conclusion that Defendant Boehner's reliance on these authorities is misplaced.

First, *Willingham v. Morgan*, 395 U.S. 402, 407 (1969), addressed only the propriety of removal, not whether such removal was proper when the federal court did not have subject-matter

jurisdiction as the parties here agree is lacking. Moreover, the central concern of *Willingham* – that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court" – is met in the instant case. The D.C. Superior Court is a "federal court" so the policy rationale underlying the decision in *Willingham* is not offended by a remand.

Finally, Sibley recognizes that the *Willingha*m court – in 1969 – held: "Federal jurisdiction rests on a federal interest in the matter". Yet *Willingham* ignored and thus did not address the issue Sibley raises here: How can Congress confer by action of §1442 subject-matter jurisdiction on an Article III court – which by action of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) was post-*Willingham* deemed to be lacking – when the Constitution does not grant such subject-matter jurisdiction? To so hold, would make the Constitution subservient to Congress, a most noxious notion repeatedly rejected since *Marbury v. Madison*.

For these reasons, Defendant Boehner's recitation of the legislative history of §1442 is simply not germane to the issue here. Congress cannot grant by statute that which Article III does not allow: litigation on the merits in a court without subject-matter jurisdiction.[4]

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[4] This argument is further buttressed by the clear law sustaining subject-matter jurisdiction in the D.C. Superior Court whose subject-matter jurisdiction is not bound by "standing" concerns. The D.C. Superior Court is an Article I, §8 Court. *See: District of Columbia v. Walters, D.C.App*., 319 A.2d 332, 338, n.13 (1974), *appeal dismissed, cert. denied*, 419 U.S. 1065 (1974)("[J]urisdiction is limited to that which Congress has bestowed upon us (pursuant to its Article I power to 'constitute Tribunals inferior to the Supreme Court.") The subject-matter jurisdiction of the D.C. Superior Court is set out at D.C. Code §11-921(a) which states: "Except as provided in subsection (b), the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia." Hence, unlike this Article III "inferior" court which is expressly limited by Article III to "Cases" or "Controversies", the D.C. Superior Court's jurisdiction is that of any state Court: in a word, unlimited. *Palmore v. United States*, 411 U.S. 389 (1973)("Seeking to improve the performance of the court system, Congress, in Title I of the Reorganization Act, invested the [District of Columbia] courts with jurisdiction equivalent to that exercised by state courts. S.Rep. No. 91-405, pp. 2-3; H.R.Rep. No. 91-907, pp. 23-24."). *Accord: N.J. Citizen Action v. Riviera Motel Corp*., 686 A.2d 1265, 1272 (N.J. Super. App. Div. 1997)("We

In sum, Congress cannot "expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). As such, lacking subject-matter jurisdiction, this "inferior court" has no discretion but must instead remand this matter to the Article I, federal court, in which it was filed.

V. CONCLUSION

WHEREFORE, for the reasons stated herein, Sibley respectfully requests that: (i) this Court remand this matter back to the District of Columbia Superior Court and (ii) retain jurisdiction to determine payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

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have recognized often that . . . **state courts are not bound by the limitations of a case or controversy** or other federal rules of justiciability even when they address issues of federal law." (emphasis added)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1964)("The constitutional and prudential considerations [of federal standing doctrine] respond to concerns that are peculiarly federal in nature.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First class mail on (i) Peter R. Maier, Special Assistant United States Attorney, Counsel for Defendant, The Honorable Mitch McConnell, 555 4th St., N.W., Washington, D.C. 20530, Telephone: (202) 252-2578, (Peter.maier2@usdoj.gov) and (ii) William Pittard, Deputy General Counsel, Counsel for The Honorable John A. Boehner, Office of General Counsel, United States House of Representatives, 219 Cannon House Office Building, Washington, District of Columbia 20515, Telephone: (202) 225-9700, (William.Pittard@mail.house.gov) this June 29, 2015.

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By: _____
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