SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MONTGOMERY BLAIR SIBLEY,

PLAINTIFF,

VS.

THE HONORABLE MITCH MCCONNELL, AND THE HONORABLE PAUL D. RYAN,

DEFENDANTS.

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Case. No.: 2015 CA 002442 B
Honorable Maurice A. Ross
Next Hearing: January 29, 2016. 10:00 a.m.
Event: Status Hearing

PLAINTIFF'S RESPONSE TO DEFENDANT MCCONNELL'S MOTION TO DISMISS

ORAL HEARING REQUESTED

Plaintiff, Montgomery Blair Sibley ("Sibley"), responds to the Motion to Dismiss of Defendant, the Honorable Mitch McConnell ("McConnell"), and states as follows:

I. SUMMARY OF ARGUMENT

First, Article III "standing" is not at issue in this Article I court.

Second, the Speech or Debate Clause affirmative defense must fail as the premise for its invocation by Defendant McConnell is flawed: The Article V duty to "call a convention for proposing amendments" is ministerial, not discretionary, and hence justiciable.

Last, the Political question doctrine is inapposite to Sibley's claims as that doctrine cannot be employed to authorize a manifestly unauthorized exercise of power.

II. SIBLEY'S ARTICLE III STANDING IS IRRELEVANT IN THIS ARTICLE I COURT

Defendant McConnell first argues that this matter must be dismissed because: "Sibley lacks Article III standing . . ." (Def. McConnell's Mot. Dismiss, p. 2). This argument must be rejected as it is plainly made in an Article I, not an Article III, court, where Article III "standing" is not an issue.

A. THIS IS AN ARTICLE I COURT

Initially, it cannot be gainsaid that the 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 jurisdiction of the 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 the Article III courts established by the Constitution which are expressly limited by Article III to "cases" or "controversies", this 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."). Importantly, Jurisdictional statutes are to be construed: "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). Here, the "jurisdictional statute" of this Article I Court references no Article III "case or controversy" limitation and hence no "standing" limitation but instead is express in granting subject matter jurisdiction in: " any civil action or other matter (at law or in equity). . ."

Thus, the Article III doctrine of "standing" does not limit the Superior Court's subject matter jurisdiction and thus its ability to hear Sibley's claims. *Accord*: *N.J. Citizen Action v. Riviera Motel Corp.*, 686 A.2d 1265, 1272 (N.J. Super. App. Div. 1997) ("We 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.").

B. *FRIENDS OF TILDEN PARK INC.* IS SO INTELLECTUALLY DISHONEST THAT IT MUST BE REPUDIATED BY THIS COURT

Obviously, Sibley is well aware of: *Sibley v. Alexander*, No. 13-cv-1151 (D.C. App. Ct. Nov. 21, 2013) cited by Defendant McConnell in which a panel of the District of Columbia Court of Appeals held:

> [T]his court has **generally** "adopted the constitutional requirement of a case or controversy and the prudential prerequisites of standing applicable to the federal courts under Article III" D.C. *Appleseed Ctr. for Law & Justice, Inc. v. District of Columbia Dep't of Ins., Sec.,& Banking*, 54 A.3d 1188, 1199-1200 (D.C. 2012); *see also* D.C. Code 11-705 (b) (2012 Repl.) (stating that divisions of this court hear and determine "cases and controversies"). (Emphasis added).

However, given the intellectually dishonesty of the *Sibley v. Alexander* opinion as detailed below and the subject-matter jurisdiction qualifier of "generally" quoted above, this Court must itself examine whether the Article III "standing" issue is applicable in <u>this</u> matter.

This examination starts with the cited case in *Sibley v. Alexander* of *Appleseed Ctr. for Law & Justice, Inc. v. District of Columbia* in which the Court of Appeals held: "Although Congress established the courts of the District of Columbia under Article I of the Constitution, we generally have adopted "'the 'constitutional' requirement of a 'case or controversy' and the 'prudential' prerequisites of standing'" applicable to the federal courts under Article III. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002)." *Id.* at 1199.

The sole reliance by the Court of Appeals upon *Friends of Tilden Park Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) to import the limitation on subject-matter jurisdiction contained in the doctrine of "standing" is misplaced and – due to the intellectual dishonesty implicit in *Friends of Tilden Park* – must be repudiated by this Court.

Notably, in *Friends of Tilden Park* this Court held:

> Congress did not establish this court under Article III of the Constitution, but we nonetheless apply in every case "the 'constitutional' requirement of a 'case or controversy' and the 'prudential' prerequisites of standing." *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991); *see also* D.C. Code § 11-705 (b) (2001) (stating that divisions of this court hear and determine "cases and controversies").

Id. at 1206. The reference to *Speyer* starts the trail of discovery of the disingenuous genesis for applying Article III "standing" to the Article I Superior Court. *Speyer* held: "In order to reach the merits, the Georgetown residents must satisfy both the 'constitutional' requirement of a 'case or controversy' and the 'prudential' prerequisites of standing. *See Community Credit Union Servs., Inc. v. Federal Express Servs. Corp*., 534 A.2d 331, 333 (D.C. 1987).

Community Credit held: **"Although this court is not governed by standing requirements under article III** of the Constitution, we look to federal jurisprudence to define the limits of 'cases and controversies' **that our enabling statute empowers us to hear**. *See Lee v. District of Columbia Bd. of Appeals & Review*, 423 A.2d 210, 216 n.13 (D.C. 1980); D.C. Code § 11-705 (b) (1981)(Emphasis added)". And therein lies the disingenuity.

Lee was an original jurisdiction proceeding brought in the D.C. Court of Appeals pursuant to D.C. Code 1978 Supp., §1-1510 (now D.C. Statute §2-510) which vested jurisdiction **in the D.C. Court of Appeals – not the Superior Court** – to entertain only petitions brought by: "[any] person

suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case . . . ." In *Lee*, the D.C. Court of Appeals held:

> **This court, of course, is not bound by the mandates of Article III**, since it was created by Congress as an Article I court. *See* D.C. Code 1973, § 11-102(2)(A); *Palmore v. United States*, 411 U.S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973). In creating this court, however, Congress provided that we, like the federal courts, should hear only "[cases] and controversies." D.C. Code 1973, § 11-705(b); see *United States v. Cummings*, D.C.App., 301 A.2d 229, 231 (1973). (Emphasis added).

What intellectual rubbish. First, the jurisdiction "created by Congress" of the D.C. Court of Appeals for agency review is found at D.C. Statute §2-510 which states: "(a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review." Moreover, the citation in *Lee* to D.C. Code §11-705(b) for the proposition that the D.C. Court of Appeals subject-matter jurisdiction is limited to "[cases] and controversies" is ridiculous.

D.C. Code §11-705(b) "Assignment of judges; divisions; hearings" states: (b) Cases and controversies shall be heard and determined by divisions of the court unless a hearing or a rehearing before the court in banc is ordered. Each division of the court shall consist of three judges." This is <u>not</u> a jurisdictional "enabling statute" as argued in *Community Credit*. Indeed, the legal term-of-art "jurisdiction" is <u>not</u> even mentioned in the chapter, title or text of §11-705.

Thus to base the holding in *Friends of Tilden Park Inc*. upon its sole and direct ancestor *Lee* is legal dissimulation at best. Most importantly, the holding of *Friends of Tilden Park Inc*. is limited to the jurisdiction of the D.C. Court of Appeals – **<u>not</u>** the Superior Court.

Accordingly, it would be "clear-cut" legal error for this Court to import the Article III limitation of "standing" into the Article I Superior Court's jurisdictional limits relying on *Sibley v. Alexander*. Indeed, to do so is manifestly improper. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) stated: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is **not to be expanded by judicial decree**."(citations omitted, emphasis added). Thus, just as courts may not expand their jurisdiction, they may not likewise contract that jurisdiction.

For the reasons aforesaid, the doctrine of "standing" has no relevance in the Article I Superior Court and thus McConnell's motion to dismiss upon this ground must be denied.

C. THE DOCTRINE OF "STANDING" IS A CANARD

Assuming *arguendo* that "standing" is a valid legal doctrine applicable to the Superior Court's subject matter jurisdiction, Sibley challenges the darling-of-the-government argument that citizens may not challenge the wrong doing of government actors as they no longer have "standing". Sibley asserts that the judicial fiat of "irreducible constitutional minimum" found first in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) is invalid as it was adopted – and blindly followed – without considering whether such a doctrine runs afoul of the powers reserved to the People under the Ninth and Tenth Amendments.

Simply stated, the People did not create a system of law which fails to satisfy certain *moral minima* for such would **not** to be a justice system but instead just-a-system. An unjust positive law – such as the doctrine of "standing" – must be refused to be recognized by any judge if the injustice created by the law is so great that it no longer deserves the title of law. Here, that injustice is the notion that the no person who can challenge Congress' failure to discharge their obligation under

Article V to "call" a convention. This, of course, is madness and raises significant equal protection concerns. Do only some get protection from government malfeasance while other are destined to suffer that wrong without a remedy?

A review of the growth of the grotesque doctrine of standing reveals its uncertain historical roots and the real basis for its cancer-like spreading through the judicial system. As of the decision of *Lujan* in 1992, "standing" has been discussed in terms of Article III on 117 occasions. Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 – that is, within seven years of 1992. Of those 117, over two thirds of the discussions occurred after 1980 – that is, in just over a decade before 1992. Of those 117, 109, or nearly all, of the discussions occurred since 1965. The first reference to "standing" as an Article III-limitation can be found in *Stark v. Wickard*, 321 US 288 (1944). The next reference does not appear until eight years later in *Adler v. Board of Education*, 342 U.S. 485 (1952). Not until the *Data Processing v. Camp*, 397 U.S. 150 (1970) did a large number of cases emerge on the issue of "standing". The explosion of judicial interest in "standing" as a distinct body of constitutional law is an extraordinarily recent phenomenon. Its rise can be seen as part of the continued expansion of federal power encouraged by the judiciary which has ignored the Ninth and Tenth Amendments expressly raised by Sibley here as one of several different Constitutional authorities vested in him to bring this suit.

Unlike "case or controversy" which the Framers understood and expressly employed in Article III, "standing" is **not** mentioned in our Constitution, **nor** was it in the records of the several conventions. Thus it can be fairly said that "standing" was **neithe**r a legal term-of-art **nor** a familiar

doctrine at the time the Constitution was adopted.[1] **Nowhere** in English common law practice can be found the requirement that a plaintiff must show an actual or threatened direct personal injury in order to have his or her "case or controversy" heard in a court of law.

Thus, when this Court undertakes determination of the first-impression question of whether the doctrine of "standing" conflicts with the rights reserved to the People under the Ninth and Tenth Amendments, the doctrine of standing falls away to those greater rights. Thus, this Court may not ground dismissal upon this ground.

D. ARTICLE III "STANDING" VIOLATES THE EQUAL PROTECTION CLAUSE

Not raised in *Sibley v. Alexander* was the equal protection argument this Court must recognized. Clearly, "the mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. . . . Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government." *Downes v. Bidwell*, 182 U.S. 244, 261 (1901). That "aegis" necessarily includes the equal protection clause and its inferred incorporation into the Fifth Amendment due process clause binding upon this Congressionally-created Article I court.

Thus, one of the rights which the Constitution must guarantee District residents, in common with all residents of the United States, is access to a court not bound by Article III "case or controversy" and thus "standing" limitations. This is particularly true where, as here, District of Columbia residents have no political process to redress this violation as this Court well knows they

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[1] Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement*?, 78 Yale L.J. 816, 818 (1968).

are completely subject to Congressional whim.

E. This Court Cannot Gut Sibley's Right to Require That the Government Be Administered According to Law

Defendant McConnell next argues that this matter must be dismissed as Sibley's demand that Congress be ordered to "call" a Constitutional Convention is "a generalized grievance about the acts or omissions of the federal government that does not establish injury in fact." (McConnell Dismiss Memo, p 5). This argument too must be rejected as it fails to address the organic right recognized in *Fairchild v. Hughes*, 258 U.S. 126, 130 (1922) that Sibley, as a Citizen of the United States, possess the general right: "to require that the Government be administered according to law. . . .". To dismiss this matter would be to expressly rule that: (i) Sibley no longer possesses such a right "to require that the Government be administered according to law" or (ii) that notwithstanding that Sibley possesses such a right, he has no means of enforcing that right. Either way, this Court would be affixing its signature to an Order which will most certainly inflame the passions of those who are beginning to question the legitimacy of a federal government which believes it is above the law. Such a signature would expressly confirm that belief.

F. Defendants – as Class Representatives – Can "Call" a Convention

Defendant McConnell last argues that: "Although Sibley proposes to seek "class certification" of all 533 remaining Members of Congress as defendants (Complaint at ¶ 12), only Senator McConnell and Speaker Ryan are named in the Complaint as defendants. Because they could not provide the relief Sibley seeks, dismissal is appropriate." (McConnell Dismiss Memo, p 7). This argument fails as if certified as a class, an order of this Court to the Class Representative Defendants to "call" an Article V convention would bind all members of the class, i.e., Congress.

Accordingly, notwithstanding Defendant McConnell's numerous angels-dancing-on-the-head-of-a-pin "standing" arguments, this Court must closely consider the implications of dismissing this suit which seeks only to require that Congress do its Article V "duty".

III. THE CONGRESSIONAL "DUTY" SOUGHT TO BE ENJOINED IS OF A MINISTERIAL CHARACTER RENDERING THE SPEECH OR DEBATE CLAUSE INAPPOSITE

Second, Defendant McConnell argues that: "the Speech or Debate Clause of the Constitution, Art. I, sec. 6, cl. 1, bars Sibley's claims because they arise out of an alleged failure to take legislative action." (McConnell Dismiss Memo, p 3). Presumably, Defendant McConnell upon this affirmative defense seeks to dismiss the action upon the 12(b)(6) grounds of the "failure of the pleading to state a claim upon which relief can be granted," In the interest of judicial expediency, Sibley will address this premature Rule 12(c) Motion for Judgment on the Pleadings argument. In sum, the Art. I, sec. 6, cl. 1, right cannot be conflated with the Article V duty to "call" a convention.

As expressed by those who knew the drafters of the Constitution: "The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, **all are subject to regulations by law, touching the discharge of the duties required to be performed.**" *Kendall v. United States*, 37 U.S. 524, 610 (1838)(Emphasis added).

Accordingly, Congress, no less that the Executive or Judicial branches, is "subject to regulation by law touching the discharge of the duties required to be performed." Among those "duties required to be performed" by Congress is that "duty" found at Article V, which states in pertinent part:

> The Congress, . . . on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; . . .

The Court's attention is drawn, to the imperative verb "shall". It leaves no discretion in Congress and requires the purely "ministerial" act of the "call". The definition of "ministerial" is well-settled in the jurisprudence of the United States. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . .There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus." *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866). *Accord*: *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

Here, Article V has proscribed a "simply, definite duty" upon Congress. The "conditions" upon which this duty arises have been "proved to exist" at this Rule 12(b)(6) stage as demonstrated by the thirty-five (35) Applications referenced in Exhibit "A" to the First Amended Complaint in this matter.

In contrast to a "ministerial" act, when an act allows discretion, mandamus will <u>not</u> lie. "Where executive officers of the government are directed by an act of Congress to interpret the act for any purpose, and there is room for more than one construction, the action of the officials in selecting the one rather than the other will not be interfered with by the courts through mandamus. In such a case, the officers exercise a discretion lodged in them by the legislature, and the courts have

no power to control the exercise of that discretion." *United States v. Roper*, 48 App. D.C. 69; 1918 U.S. App. LEXIS 2355 (D.C. Cir., 1918).

Sibley argues that Article V leaves no "room for more than one construction". The Supreme Court agrees with Sibley: "[A]rticle 5 is clear in statement and in meaning, contains no ambiguity and calls for no resort to rules of construction. . . . It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, or, on the application of the legislatures of two-thirds of the States, **must call a convention to propose them**." *United States v. Sprague*, 282 U.S. 716 (1931)(Emphasis added).

Without contention, the parties agree that the touchstone of the Speech or Debate clause affirmative defense is that the conduct must reside within the: "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). However, *Tenney* went on to recognize that it was equally clear that "legitimate legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. . . . This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* at 377, (Citations omitted).

In *Gravel v. United States*, 408 U.S 606, 625 (1972), the Court in determining whether the Speech or Debate clause was applicable looked to see if the activities are: "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Here, without question, there is no "consideration and passage or rejection of proposed legislation" with

respect to an Article V "call".

To allow Congress the liberty of refusing to do their express "duty" and then hide from review and enforcement of that duty under the Speech or Debate clause would render the promise of *Fairchild v. Hughes*, 258 U.S. 126, 130 (1922) that every Citizen of the United States, possess the general right: "to require that the Government be administered according to law. . . ." a right without a remedy and thus a cruel farce.

Remarkably, Defendant McConnell's own argument supports Sibley's contention. Defendant McConnell argues: "Under the Speech or Debate Clause of the Constitution, for 'any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.' U.S. Const. art. I, § 6, cl. 1. That clause bars Sibley's claims. It must be read 'broadly to effectuate its purposes,' which include insuring 'that the legislative function the Constitution allocates to Congress may be performed independently.' *Eastland v. United States Servicemen's Fund*, 421 U.S. at 502." (McConnell Dismiss Memo, p 9). Here, the Article V duty to "call" has no "passage or rejection of proposed legislation" element. There is no "legislation" attached to this duty to "call" a Convention.

Accordingly, the ministerial duty to "call" an Article V Convention to Propose Amendments is not defeated by the Speech or Debate clause and Defendant McConnell's motion to dismiss in this regard must be denied.

IV. THIS COURT CAN NOT STAND IMPOTENT BEFORE AN OBVIOUS INSTANCE OF A MANIFESTLY UNAUTHORIZED EXERCISE OF POWER

Sibley here raises the first-impression legal issue of the jurisdiction of this Court to address

the omission by Congress of its duty to make the Article V "call".[2] As such, the Defendant McConnell's argument that "the Complaint also presents a non-justiciable political question" and thus must be dismissed likewise must be rejected by this Court. (McConnell Dismiss Memo, p 11). Plainly, as observed in *Baker v. Carr,* 369 U.S. 186, 215-217 (1962): "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder. . . .[The Courts] will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." Here, Sibley argues that the refusal of Congress to "call" an Article V Convention is the very definition of an "unauthorized exercise of power."

Patently, there has been no judicial determination of this first-impression issue of an omission being "unauthorized". Initially, Sibley reminds this Court that the Constitution is not a "suicide pact" designed to irrevocably concentrate power in a central government. As Alexander Hamilton noted in the Federalist No.: 85:

> It is this: that the national rulers, whenever nine States concur, will have **no option upon the subject**. By the fifth article of the plan, the Congress will be obliged "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments, which shall be valid, to all

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[2] In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)(The President of the United States has no formal role in the process of amending the United States Constitution); *Hawke v. Smith*, 253 U.S. 716 (1920)("The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the states, or conventions in a like number of states. *Dodge v. Woolsey*, 18 How. 331, 59 U. S. 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."); *Dillon v. Gloss*, 256 U.S. 368 (1921)("A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the states Congress shall call convention for the purpose.");

> intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." **The words of this article are peremptory**. The Congress "shall call a convention." **Nothing in this particular is left to the discretion of that body**. . . . We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority. (Emphasis added).

Accordingly, Defendant McConnell's claim that he can ignore the "peremptory" words of Article V by hiding behind the Speech or Debate clause is an aberrant violation of the carefully-balanced distribution of power between the People, States and the federal government. Simply stated, to allow by this device of the Political Question affirmative defense the central government to ignore the pleas of the States would put Hamilton's promise to waste.[3]

Moreover, the Supreme Court has rejected the Political Question affirmative defense in a compellingly analogous situation in *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, the Court had to determine whether or not Congress could exclude a member-elect of Congress based on a majority vote for reasons other than those qualifications of office specified in the Constitution.. As with Article V, the absolute imperative of a two-thirds (2/3s) vote to remove was employed in Article I, §5.[4] As discussed in *Powell*, the Constitution uses an imperative verb in regard to Congress

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[3] *Accord*: *Prigg v Commonwealth of Pennsylvania*, 41 U.S. 539 (1842)("[T]he Court may not construe Constitution so as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them"); *Jarrolt v Moberly*, 103 U.S. 580 (1880)("A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed"); *Wright v U.S.*, 302 U.S. 583 (1938)("In expounding the Constitution, every word must have its due force and appropriate meaning"; *United States v. Classic*, 313 U.S. 299 (1941)("The courts cannot rightly prefer, of the possible meanings of the words of the constitution, that which will defeat rather than effectuate the constitutional purpose.")

[4] "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member."

being able to judge elections, returns and qualifications of its members, and it does permit under a specified procedure that a Chamber of Congress can expel a member.

In *Powell*, the Speaker of the House argued that these provisions provided exclusive discretion to Congress to determine under what terms and conditions an elected member of Congress could be seated, and that Congress could create any terms it wished in order to deny a Citizen elected to Congress a seat in Congress. The Supreme Court disagreed saying: "For these reasons, we have concluded that Art. I, §5, is, at most, a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the 'textual commitment' formulation of the political question doctrine does **not** bar federal courts from adjudicating petitioners' claims." *Id*. at 548. (Emphasis added).

Likewise, the "textually demonstrable commitment" to Congress to "call" an Article V Convention does not bar this Court from adjudicating Sibley's claim. In the case of election to Congress, residency, age and citizenship requirements are enumerated in Article I. In the case of the Article V Convention "call", a specific number of applying states (based on a ratio to the total number of states in the Union) is enumerated. In the case of *Powell*, Congress attempted to limit the selection; in the case of the Article V Convention "call", Defendant McConnell argues that Congress can ignore-with-impunity its "duty" in this regard.

Simply stated, an Article V Convention "call" is "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution: Conducting a numeric count of the applications to determine that two-thirds of the states have applied for a convention. Thus, just as Congress could not exclude a member by a simple majority vote, neither can Congress refuse to "call" a Convention.

Defendant McConnell next argues that: "Thus, the questions about the Constitutional amendment process are committed exclusively to Congress, and there are no judicially manageable standards to answer them. Therefore, the Complaint presents a nonjusticiable political question." (Def. McConnell's Mot. Dismiss, p. 11). Defendant McConnell's argument in this regard must fail once resort is had to *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920) in which the Court ruled: "The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present-assuming the presence of a quorum-and not a vote of two-thirds of the entire membership, present and absent."

Plainly, the interpretation of "two-thirds of both Houses shall deem it necessary" found in Article V was open to a final definition – and thus not barred by the Political Question doctrine – by the Supreme Court. In so defining these words (two-thirds) the Court established a precedent: that it possesses definition jurisdiction of the words used in Article V and the intent of their meaning. Thus, this Court is able to define other words contained in Article V of the Constitution where confusion, politically motivated or otherwise, exists as to their intent and meaning. Therefore, this Court can and must define the meaning of the word "call" as it applies to Article V and the resultant duty of Congress to act.

Finally, Defendant McConnell's citation to *Nixon v. United States*, 506 U.S. 224 (1993) and *Morgan v. United States,* 801 F.2d 445 (D.C. Cir. 1986) for the proposition that the obligation of Article V to "call" a convention to: "the legislative branch does not differ materially from the power to try impeachments", is misplaced. (Def. McConnell's Mot. Dismiss, p. 12). Article I and Article V are two different articles in scope and meaning and thus different rules apply to them. Article I states in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the

United States, which shall consist of a Senate and House of Representatives." Section 1 is a vesting clause, granting all the federal government's legislative authority to Congress. In contrast, "Article V acts as the cover letter. It is a set of instructions that the Framers left providing the terms on which future generations may add a new chapter to the constitutional chain novel." *Chain Novels and Amendments Outside Article V: A Literary Solution to a Constitutional Conundrum*, 33 Hamline L. Rev. 71, 90 (2010). Hence, there is no "legislative Powers" resident in an Article V act; to hold so would allow the federal Congress to erase the power of the States to "call" a convention by setting impossible limits upon the triggering of the duty to make the obligatory "call".

Therefore, the duty to "call" an Article V Convention to Propose Amendments is not defeated by the Political Question doctrine and thus Defendant McConnell's motion to dismiss in this regard must be denied.

V. CONCLUSION

Make no mistake about the purpose and intent of this lawsuit. The Constitution was written more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slave-holders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten. Yet, notwithstanding that embarrassing pedigree, the Constitution remarkably carries with it an invitation in Article V to amend and therefore a guarantee to this generation to join as it sees fit with the preceding generations of Americans to alter this joint social compact as they deem fit.

Yet, that guarantee of the ability to "alter" to form a "more perfect Union" exists now merely as a teleological promise for some indefinite future, now wielded as it is by usurpers in Congress would deny that right by inaction. Will this Court confirm by its signature that usurpation by

choosing one of the offered angel-dancing-on-the-pin arguments and thus confirm the death of Article V's promise?

Rather, this Court must deny the motion of Defendant McConnell and expeditiously recognize it's duty to move this matter forward for resolution.

WHEREFORE, Sibley respectfully requests that Defendant McConnell's Motion to Dismiss be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Email on (i) Peter R. Maier, Special Assistant United States Attorney, Counsel for Defendant, The Honorable Mitch McConnell, (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, (William.Pittard@mail.house.gov) this November 30, 2015.

ORAL HEARING REQUESTED

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