

Appeal Underway in Sibley Lawsuit; FOAVC Presents New Feature

By Bill Walker

Speaking from personal experience I can tell you nothing moves slower than the appeals process in federal court. When I filed my second federal lawsuit, Walker v Members of Congress for example, it took 18 months from the date of submission to the Ninth Circuit Court of Appeals until the Court rendered its one page opinion.

So it is no surprise then that Maryland attorney Montgomery Sibley's lawsuit against Senate Majority Leader Mitch McConnell and House Speaker Paul Ryan attempting to cause a convention call is moving at a snail's pace in D.C. Court of Appeals. (In fact the snail probably moves more quickly).

On January 21, 2016 Sibley filed a "[Statement of Issues](#)" with the appeals court outlining what issues he intends to present in his appeal. He has also released a preliminary [Appendix](#) which contains all evidentiary material used his appeal. Under court rules Sibley has 20 days (after notification from the court clerk) to file his Appendix and reportedly is waiting for a response from William Pittard and Peter Maier, government attorneys representing McConnell and Ryan as to whether they wish to add any material to the Appendix.

In related news, the Sibley lawsuit finally received press coverage from the mainstream media in the form of a story in the [Washington Post](#). While the story was overall accurate (for example it only erroneously referred to an Article V Convention as a "constitutional convention" once) the story's overall conclusion was way off base. Basically, the story reflected the opinion of Michael Farris, co-founder of the Convention of States (COS) movement. I have written about COS on several occasions. (See: www.foavc.org/reference/file58.pdf for example).

"I didn't know this suit was filed, but it's without merit and it's really not helpful to the Article V movement," Farris was reported to have said in the Post article. Ignoring the opportunity to state this proves Farris (and most likely COS) are obviously not up on current events I will instead point out Mr. Farris is incorrect. If Sibley loses his lawsuit and the federal courts determined Congress can refuse to call a convention for any reason other than an insufficient number of applying states; Farris can kiss his Convention of the States movement goodbye because a convention call will never happen. Only if Congress is mandated to call will they then yield up the power of amendment to a convention. If the courts ultimately rule that because of the speech and debate clause, political question or whatever Congress has a choice as to whether to call a convention that choice will always be to refuse.

In short, what is at stake here and obviously Farris doesn't understand is the legal principle, central to the Founders, that a convention call is peremptory on Congress. This means Congress has no option but to call if the states apply in sufficient numbers to satisfy the two thirds standard of Article V. Pittard and Maier are doing everything they can to defeat that premise. Now of course Farris will claim (and has) that when COS gets its applications Congress must call a convention. But the fact is that will never happen if Sibley loses because it will already be determined by court ruling Congress can refuse to call regardless of whatever set of applications

are presented. The fact is COS is only about two years old. It has managed, according to most published reports, to only garner support from five states for its version of a convention call through submitted applications to Congress. That works out to about two states a year. At that rate it will be the year 2031 before enough states submit applications supporting COS. As slow as it is I guarantee the D.C. Appeals Court will have reached a decision long before that meaning COS needs Sibley to win his suit. Yet here the COS co-founder sits knocking down someone whose success can only help COS achieve its goal.

Knocking people down seems to be a habit with COS. Reports that COS representatives, have, for lack of a better term, ticked people off continue to multiply. Reportedly, COS representatives, as termed by one source requesting anonymity, demonstrated an “arrogant” attitude toward various state legislators in several state legislatures. This attitude infuriated many members of state legislatures, so much so that one source said, “COS will never be welcomed back to this legislature ever again.” Such a report does not bode well for a group trying to gain legislative support for their announced plan to exclude the American people from the convention process. After all it will be these state legislatures who will have to face the political heat for lending their support to this outlandish proposal so “ticking” them off doesn’t strike me as the best political strategy to achieve political success.

If these reports are true, the question must be asked: who is really helpful to the Article V movement—an attorney fighting a one man uphill battle to make Congress obey the Constitution or a political group apparently more bent on its own political destruction than accomplishing a convention call. I say this because as I’ve pointed out before: if COS succeeds in getting a convention the way they want it, it will be at the expense of the American people who, according to COS statements, will be excluded from the entire convention process leaving it in the hands of a few select politicians. Of course, these politicians will be puppets of COS. For those considering buying the goods COS sells, I say: caveat emptor.

In other news, FOAVC, (Friends of the Article V Convention) a group I helped co-found in 2007 released a new feature on its website. The feature, showing state applications grouped by “[same subject](#)” presents some interesting issues for “same subject” advocates (such as COS) who maintain that Congress must first “aggregate” state applications for a convention call into “same subject” groups and cannot call a convention unless two thirds of the states have applied for the same amendment subject. What this actually means is these advocates believe Congress has veto power over a convention call.

As with most things presented by COS, this unproven theory of “same subject” is based on bogus, unsupported evidence (namely none) originally created by the John Birch Society (JBS) in the 1980’s when JBS used opposition to an Article V Convention as a cover for its real purpose: opposition to a balanced budget amendment. The fact is applications are counted by numeric count of the applying states with no terms or conditions. (See: www.foavc.org/reference/1930.pdf and www.foavc.org/reference/05051789.pdf). In addition to historic evidence from the 1787 Convention, the Supreme Court has ruled on at least four different occasions a convention call is based on a numeric count of applying states. The reason it is a numeric count is because if it were “same subject” Congress could simply contrive

whatever “aggregation” it desired in order to create a circumstance where it was not required to call when, in fact, it should have called.

This is why the Founders wisely made a convention call “peremptory” and based the call on a numeric count of applying states (something a third grader can irrefutably determine) meaning Congress can use no excuse not to call. Obviously giving Congress “same subject” authority provides Congress a means whereby it does not have to call and thus fails the “peremptory” test. Thus, “same subject” is bogus and unconstitutional.

FOAVC plans to release another web page in the near future showing state applications grouped by numeric count. According to Article V, Congress must call a convention, “on the application of two thirds of the several state legislatures.” This means multiple conventions can be called and must be called each time a set of two thirds of the several state legislatures apply. The first set occurred on Friday, March 13, 1908 and there have been hundreds of applications submitted since meaning Congress is required to call multiple conventions. The page will show when these conventions should have been called and what group of states triggered the call.