Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BILL WALKER,	)	
	)	No. COO-2125C
Plaintiff,	)	
	)	
v.	)	MOTION TO DISMISS
	)	
UNITED STATES,	)	NOTE ON MOTION CALENDAR:
	)	FEBRUARY 16, 2001
Defendant	)	

COME NOW Defendants in the above-captioned action and move this Court for an Order of Dismissal.

This motion is based upon plaintiff's Complaint and upon the Memorandum in Opposition to Plaintiff's Motion for Declaratory and Injunctive Relief and in Support of Cross-Motion to Dismiss submitted herewith.

DATED this 24th day of January, 2001.

Respectfully submitted,

KATRINA C. PFLAUMER
UNITED STATES ATTORNEY

(Signature)

HAROLD MALKIN
ASSISTANT UNITED STATES ATTORNEY

Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BILL WALKER,	)	
	)	No. COO-2125C
Plaintiff,	)	
	)	
v.	)	UNITED STATE' MEMORANDUM IN
	)	OPPOSITION TO PLAINTIFF'S MOTION
UNITED STATES,	)	FOR DECLARATORY AND INJUCTIVE
	)	RELIEF AND IN SUPPORT OF
Defendant	)	CROSS-MOTION TO DISMISS

COMES NOW the United States and files this Memorandum in Opposition to Plaintiff's Motion for Declaratory and Injunctive Relief and in Support of Cross-Motion to Dismiss.

Introduction

Plaintiff's lawsuit alleges that Congress has ignored Article V of the Constitution and violated his constitutional rights by failing to heed the call of two-thirds of the States to call a Constitutional Convention to consider proposed amendments to the Constitution. Specifically, plaintiff alleges that Congress' purported refusal to convene a Constitutional Convention has violated his right to seek elected office – *i.e.*, that of delegate to a Constitutional convention; his right to vote on any amendments that are ultimately the product of a such a Convention; and his "right of redress." Complaint at ¶ 4. the complaint seeks a Judgment against congress in the form of an Order compelling

Congress to comply with Article V of the Constitution and to call a Constitutional Convention.[1]

In addition to the Complaint, plaintiff also filed a Motion Seeking Declaratory and Injunctive Relief, which includes an expansive Order compelling Congress to convene and conduct a Constitutional Convention *via the Internet* and prescribing the procedural rules in accordance with which the Convention shall proceed. *See* Brief in Support of Convention at 6 and Order in Support of Motion. Plaintiff's initial 781-page Memorandum of Law was rejected by this Court as overlength. Subsequently, plaintiff filed a more modest 7-page "Brief in support of Convention." The instant Opposition and Cross-Motion demonstrates that plaintiff's motion must be denied and, moreover, that the United States' cross-motion should be granted, inasmuch as plaintiff's lawsuit raises issues that are clearly non-justiciable. Plaintiff's allegations fail to satisfy the elements of constitutional standing and present inherently 'political questions', the resolution of which are best left to the Legislative rather than to the Judicial Branch.

Argument

A motion to dismiss should ordinarily not be granted unless it can be demonstrated beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957). In ruling on such a motion, a district court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. *Knevelbaard Dairies v. Kraft Foods, Inc.* , 232 F.3d 979, 984 (9th Cir. 2000).

Justiciability is a threshold requirement of all claims brought in federal court. *See e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316,

[1] Indeed, plaintiff's lawsuit appear more in the nature of a *mandamus* action.

328, 119 S.Ct. 765, 772 (1999). Whether a claim is justiciable depends on whether it may properly be resolved by the courts. *Nixon v. United States*, 506 U.s. 224, 226, 113 S.Ct. 732, 734 (1993). Where the party bringing a lawsuit in federal court lacks constitutional standing and/or where the claim presented raises a 'political question', the lawsuit is non-justiciable. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950 (1968).

A. Article V of the Constitution

Article V of the Constitution, the substance of which is at the heart of plaintiff's lawsuit, sets forth the process by which the Constitution may be amended. Article V states, in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, 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 Congress….

B. Standing

To satisfy constitutional "standing" requirements, a plaintiff bears the burden of establishing that he meets *each* of the following: (1) he has suffered and "injury in fact";(2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is "likely", as opposed to "speculative", that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992); *see also Central Arizona Water Conservation District v. United States Environmental Protection Agency*, 990 F.2d 1531, 1537 (9th Cir. 1993). Moreover, it is well-settled that citizens generally lack standing to assert such "generalized grievances"

as a right to a particular kind of government conduct and/or that the government must act in accordance with law. *See e.g., Allen v. Wright*, 468 U.S. 737, 750-756, 104 S.Ct. 3315, 3324-27 (1984). As is discussed immediately below, plaintiff satisfied none of the requisite elements of constitutional standing and, hence, lacks standing to pursue the relief he seeks.

1. *Injury in Fact*

For purposes of demonstrating "standing", the Supreme Court has defined an "injury in fact" to be "an invasion of a legally protect interest which is (a) concrete and particularized and (b)actual or imminent, not conjectural or hypothetical." *Id*. At 560, 112 S.Ct. at 2136. The Complaint alleges the following injuries: violation of plaintiff's right to seek the elected office of delegate to a Constitutional Convention; violation of plaintiff's right to vote on any constitutional amendments that a Constitutional Convention, if called, might generate; and violation of his right to redress grievances through the amendatory process set for in Article V. Complaint at ¶ 4; *see also* Brief in Support of Motion for Declaratory Relief at 4-5.

Both Article V of the Constitution and the Washington State Constitution are completely silent concerning the subject of delegates to a convention to amend the U.S. Constitution. Whether elected delegates separate and apart from the members of the Washington State Legislature would represent the State of Washington at a Constitutional Convention is thus an open question. Similarly, even were private citizens eligible to seek election as delegates to a Constitutional Convention, there is no way to know whether plaintiff would meet whatever eligibility requirements might ultimately be required of prospective delegates. Accordingly, plaintiff's allegation that his right to seek election as

a delegate to a Constitutional Convention is neither "concrete and particularized" nor "actual and imminent," but rather entirely conjectural and hypothetical. *Lujan, supra.*

Plaintiff's claim that his right to vote on amendments that might be generated by a Constitutional Convention is likewise conjectural. Although the purpose of a Constitutional Convention is to consider amendments to the Constitution, the fact that there has never been such a Convention since the Constitution itself was adopted affords little insight into the probability that the product of such a convention will, in fact, be one or more proposed amendments. Moreover, even assuming that a Constitutional Convention would generate one or more amendments for ratification by three-fourths of the States, Article V of the Constitution provides that ratification shall be by the Legislatures of the several States or by Conventions, as Congress may prescribe. U.S. Constitution, Art. V. Consequently, because citizens are not guaranteed the right to vote directly in favor of or against ratification of proposed constitutional amendments, plaintiff cannot claim injury to a "legally protected interest", let alone to an injury that is "concrete" and "actual." *Lujan, supra*.

The third and final injury alleged by plaintiff – that his right to petition the government for redress of grievances has been violated – also falls short of amounting to an "injury in fact." Article V of the Constitution directs Congress to call a Constitutional Convention upon "Application of the Legislatures of two thirds of the several States." To the extent that by applying to congress to convene a Constitutional Convention a state legislature could be construed to be seeking redress from the Federal government, Article V vests in states legislatures, *not* in citizens such as plaintiff, the authority to apply to Congress to request a Constitutional Convention. Because the Constitution affords

citizens no mechanism, and certainly no right, to insist that Congress convene a Constitutional Convention, plaintiff's claim that he has been deprived of his right to petition Congress to consider amending the Constitution does not amount a cognizable injury for purposes of establishing standing.

2. *Causation*

The causation requirement of constitutional standing requires a showing that the injury alleged be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan, supra: Virginia Sur. Co. v Northrup Grumman Corp*., 144 F.3d 1243, 1246 (9th Cir. 1998). While plaintiff attempts to link his alleged injuries to Congress' purported refusal to act in compliance with Article V of the Constitution, none of those injuries, in reality, is "fairly traceable" to anything Congress is alleged to have done or declined to do.

As is discussed above, the injuries plaintiff claims to have sustained are not a result of Congress' alleged failure to convene a Constitutional Convention. Even if Congress were obliged to call a Constitutional Convention, it is by no means settled that citizens-at-large could serve as delegates and/or plaintiff would possess the requisite qualifications to seek election as a delegate. Likewise, plaintiff's claim that he has been deprived of the right to vote in favor of or against potential amendments to the Constitution cannot fairly be attributed to Congress' purported refusal to convene a Constitutional Convention. Nothing in Article V of the Constitution, nor in any provision of the Washington State Constitution, provides that proposed constitutional amendments shall be subject to ratification by a direct vote of the electorate. Since individuals have no right to vote on proposed amendments to the Constitution in the first place, Congress'

alleged failure to convene a Constitutional Convention cannot be the cause of plaintiff's alleged injury.

Identical logic applies to plaintiff's claim that Congress' supposed unwillingness to call a Constitutional Convention has interfered with his right to redress grievances through the amendatory process set forth in Article V. The Constitution affords state legislatures, *not* the citizens of the several states, the opportunity to petition Congress to convene a Constitutional Convention to consider possible amendments to the Constitution. Where the Constitution bestows no right on the *people* to petition Congress directly to redress popular grievances through the mechanism of a Constitutional Convention, Congress' alleged refusal to call such a Convention cannot be the cause of plaintiff' inability to seek redress of grievances via constitutional amendment.

3. Redressability

The third and final element of constitutional standing requires plaintiff to demonstrate that it is "likely, as opposed to merely speculative, that [the injuries he alleges] will be redressed by a favorable decision." *Lujan, supra; Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172, 1176 (9th Cir. 2000). Plaintiff cannot satisfy this element of standing either.

Putting aside serious and substantial separation of powers issues that are addressed immediately below, and assuming *arguendo* that plaintiff's motion for declaratory and injunctive relief were to be granted by this Court, plaintiff's alleged injuries would *not* be redressed by a favorable decision. In the event that this Court were to undertake to order Congress to call a Constitutional Convention, neither the plain language of Article V of the Constitution nor any provision of state law entitles plaintiff

to: (1) seek election as a delegate to a Constitutional Convention; (2) vote directly for or against ratification of proposed constitutional amendments; or (3) personally invoke the amendatory process set forth in Article V to dress grievances against the Federal government. Consequently, a favorable decision by this Court on plaintiff's motion will in no way ameliorate his alleged injuries.

In short, as the forgoing discussion illustrates, plaintiff's lawsuit must be dismissed because he is unable to satisfy *any* of the three required elements of constitutional standing.

B. Political Question

In its seminal decision in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962), the Supreme Court explained that the 'political question doctrine' arises from "the relationship between the judiciary and the coordinate branches of the Federal Government…" *Id*. At 210, 82 S.Ct. at 706; *see also Powell v. McCormack*, 395 U.S. 486, 517, 89 S.Ct. 1944, 1961 (1969). "A controversy is nonjusticiable—*i.e.*, involves a political question – where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it …'" *Nixon*, 506 U.S. at 228, 113 S.Ct. at 735, quoting *Baker*, 369 U.S. at 217, 82 S.Ct. at 710; *see also Clinton v. Jones*, 520 U.S. 681, 700 n.34, 117 S.Ct. 1636, 1647, n.34 (1997). Accordingly, the issue posed squarely by the instant lawsuit – under what circumstances does the Constitution oblige Congress to call a Constitutional Convention – is quintessentially a non-justiciable political question.

Article V of the Constitution sets forth the process for amending the Constitution. Amendments can be proposed by a vote of two-thirds of both the House and Senate or

when two thirds of the Legislatures of the "several States" apply to Congress to call a Convention to propose amending the Constitution. *See* **Section A**, *supra*. Ratification of any amendments so offered must be by either State Legislatures or by Conventions in three fourths of the states, as Congress, in its discretion, may prescribe. *Id*. While a total of thirty-three amendments to the Constitution have been proposed to the States pursuant to Article V, all of them arose out of a vote of the requisite majorities in Congress and none was the product of the Convention alternative. *See* United States Code (1994 ed.), Vol. 1 at LX-LXIX.

Because it has never successfully been invoked, the Convention method of amendment raises a host of fundamental and previously unanswered constitutional questions, answers to which are neither obvious nor unimportant to the very 'blueprint' of our Republic. Such questions include, but are no means limited to:

> Precisely when and how is a Constitutional Convention to be convened?
>
> Must the subject matter of the applications of the requisite number of States be identical, or request substantially the same amendment, or merely deal with generally related issues?
>
> Must the requisite number of applications be submitted together, substantially contemporaneous or within several years of one another?
>
> Can a Convention be limited to consideration of the amendment or general subject matter that the Convention was convened to consider?

These same questions are implicit in plaintiff's lawsuit, which alleges that, since the Constitution itself was ratified, the requisite number of States have cumulatively and in the proper manner applied to Congress to convene a Constitutional Convention.[2]

---

[2] Neither the Complaint nor the Motion for Declaratory and Injunctive Relief readily identifies those states that plaintiff alleges have applied to Congress to call a Convention, the dates of such applications are alleged to have been made, nor the subject matter, if any, of the applications.

In determining whether a lawsuit is non-justiciable because it raises a political question, courts must commence by examining the language of the relevant provision(s) of the Constitution to determine "whether and to what extent the issue is textually committed [to either the Legislative or executive branch of the government]." *Nixon*, 506 U.. at 228; 113 S.Ct at 735. The concept of textual commitment of an issue to another branch of government is related to the other principal inquiry involved in political question analysis, the concept of judicially discoverable and manageable standards for resolving the issue at bar. *Id*. In other words, in the absence of an express commitment of an issue to another branch, the lack of judicially discoverable and manageable standards may strengthen the conclusion that there is an implicit textual commitment of the issue to a coordinate branch. *Id*. At 228-229; 113 S.Ct. at 735.

While the Constitution in Article V unequivocally commits to the discretion of Congress the manner by which amendments to the Constitution shall be ratified by the states, the Constitution does not expressly address the myriad procedural questions surrounding the Convention method of amendment. The complete absence of any judicially discoverable and manageable standards applicable to a process in which Congress obviously plays so pivotal a role, strongly implies that congress was meant to be the final arbiter of when the conditions precedent set forth in Article V have bee complied with sufficiently to warrant convening a Convention.

Support for this proposition can be found in the Supreme Court's analogous decision in *Coleman v. Miller*, 307 U.s. 433, 59 S.Ct. 972 (1939), wherein the Court held that the questions of how long a proposed constitutional amendment remained open to ratification and what effect, if any, a prior rejection had on a subsequent ratification were

"committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." *Baker,* 369 U.S. at 214; 82S.Ct. at 708 (interpreting *Coleman*). The United States submits that the same logic dictates that the kinds of issues raised by this lawsuit – *i.e.*, whether the applications plaintiff alleges have been made by two-thirds of the States are sufficiently contemporaneous and whether the subject matter of the applications are sufficiently related – are similarly non-justiciable, because they, too, raise political questions best left to Congress to resolve.[3]

Conclusion

For all of the reasons set forth above, plaintiff's Motion for declaratory and Injunctive Relief must be denied and the United States' Motion to Dismiss should be granted.

Dated this 24th day of January, 2001

Respectfully submitted,

KATRINA C. PFLAUMER
UNITED STATES ATTORNEY

(Signature)

HAROLD MALKIN
ASSISTANT UNITED STATES ATTORNEY

[3] The Speech and Debate Clause of the Constitution, art. I § 6, cl 1, and the doctrine of sovereign immunity furnish additional grounds for dismissal. The Speech and Debate Clause has been held to immunize legislative activity, and by extension inactivity, related to consideration and passage or rejection of propose legislation or other maters, such as the amendatory process, which the Constitution places within the jurisdiction of either the House of Representatives or the Senate. *See Gravel v. United States,* 408 U.S. 606, 625, 92 S.Ct. 2614, 2627 (1972). Similarly, suits against Congress attempting to compel

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BILL WALKER,	)	
	)	No. COO-2125C
Plaintiff,	)	
	)	
v.	)	[Proposed] ORDER
	)	
UNITED STATES,	)	
	)	
Defendant	)	

Having carefully considered the United States' Motion to Dismiss, plaintiff's Oppositior and the United States' Reply, IT IS HEREBY ORDERED that the United States' motion is GRANTED. Further, and consequently, plaintiff's Motion for Declaratory and Injunctive Relief is DENIED.

Dated:_____ _____

UNITED STATES DISTRICT JUDGE

Presented by:

(Signature)

HAROLD MALKIN
ASSISTANT UNITED STATES ATTORNEY

Congress to take action have been barred on the basis of sovereign immunity. *See e.g., Keener v. Congress*

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of the United States, 467 F.2d 952, 953 (5th Cir. 1972).