05-35023

United States Court of Appeals

For the Ninth Circuit

Bill Walker, pro se

Appellant

v.

Members of Congress, et al.

Appellees

Motion To Strike Brief Submitted by Ms. Utiger of Department of Justice As Non-Responsive in Failing to Address Subject Matter of Suit

Motion is made by appellant to strike the brief submitted by Ms. Utiger of the Department of Justice from the court record on the grounds the submitted brief is non-responsive. The submitted brief fails to address the subject matter of the suit before this court.

The subject matter of this suit is the refusal of appellees to call a convention to propose amendments as peremptorily required by Article V of the Constitution. This suit also addresses civil and criminal violations of federal law by appellees related to this refusal. The subject matter not before this court in this suit is the issue of a "constitutional convention" a term repeatedly and consistently used by Ms. Utiger in her brief.

It is a well-settled fact that the meaning of the term "constitutional convention" as used by the political establishment today means a convention of unlimited political power able to revamp the entire Constitution or create a new Constitution as its sole discretion without restraint whatsoever. It is also a well-settled fact that those who politically oppose the calling of a convention to propose amendments, which of course includes the appellees, liberally use the term "constitutional convention" in an attempt to frighten the constitutionally unaware so as to acquire their consent in appellees' unconstitutional disobedience. The dirty little secret is those opposed to calling of a convention to propose amendments are those whose political power would be threatened by such a call, specifically the appellees. It is

for this reason the Founders wisely made the convention call peremptory eliminating any possibility of those in power who have abused that power preventing the people the ability to redress that abuse through a convention amendment proposal.

The issue of striking Ms. Utiger's brief for use of the term "constitutional convention" is not one of semantics but of fundamental constitutional law. No where in the entire Constitution is the term "constitutional convention" employed even where such a phrase might logically be expected to appear, e.g. "We the People, in constitutional convention assembled, in order to…"[1] Thus, clearly the term "constitutional convention" was deliberately excluded from the Constitution by the Founders.

Instead, in Article V of the Constitution, the term "convention to propose amendments" is used. Colloquially, this term can be shorted to an "amendment convention" but certainly not a "constitutional convention." Article V limits the powers of a convention to propose amendments or amendment convention to precisely "*proposing* amendments…to *this* Constitution." (Emphasis added). Thus a convention to propose amendments *cannot* write a new constitution because such proposal would not be an amendment to the present Constitution. The amendment

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[1] The Founders did employ such language, e.g., the Declaration of Independence where the Founders stated, "We, therefore, the Representatives of the United States of America, *in General Congress, Assembled*…" (Emphasis added) but obviously chose not to for the Constitution.

convention cannot enact an amendment proposal on its own initiative. An amendment convention has no further powers or constitutional responsibilities beyond proposing amendments. Indeed, by itself, an amendment convention has no power whatsoever. It can only propose amendments to be considered by the states for ratification. If the three-quarters of the states do not ratify the amendment proposals, the proposal has no legal effect whatsoever.

Further, delegates elected to an amendment convention are federal officials. As such they are required by 5 U.S.C. 7311 to take a loyalty oath just as appellees are required to take. The terms of that federal statute makes it clear that any other action by these delegates beyond proposal of amendments to the present Constitution is a violation of federal civil and criminal law. If the delegates attempted to use a amendment convention to write a new constitution, they would be attempting to overthrow our constitutional form of government by subverting its amendment process. Hence, the actions insinuated by the term "constitutional convention" are not constitutionally permitted and are violations of federal criminal law. Thus a "constitutional convention" is a unconstitutional act and cannot legally occur.

It is well settled law that it cannot be presumed that any clause in the Constitution is intended to be without effect. Thus all the language of the Constitution is to be considered as having effect. It is well settled law that nothing new can be put into the Constitution and nothing old taken out except by amendment. It is well set-

tled law that the language of the Constitution which permits one thing excludes another. (See Marbury v. Madison, 5 U.S. 137 (1803); Ullmann v. United States, 350 U.S. 422 (1956); Pine Grove v. Talcott, 86 U.S. 666 (1873)). It well settled law that when several possible meanings of the words in the Constitution exist, those meanings which defeat rather than effectuate the constitutional purpose cannot be preferred. It is well settled law that where the intention of words and phrases used in the Constitution is clear, there is no room for construction and no excuse for interpolation. (See United States v. Classic, 313 U.S. 299 (1941); United States v. Sprague, 282 U.S. 716 (1931)).

The United States government has already admitted that Article V is plain in meaning and requires no interpretation by the court.[2] Therefore for the Department of Justice to insert the term "constitutional convention" for the term found in the Constitution, "convention to propose amendments" or its colloquial term, "amendment convention" requires interpretation by the court. This interpretation requires the court change, alter or expand the explicit limited power of an amendment convention proposing amendments to the present Constitution. It is well-

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[2] "The United States asserts that article 5 *is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction*. A mere reading demonstrates that this true. 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).

settled law that it neither the function of legislature nor court, whether federal or state, to alter the terms of the amendatory process.[3] The government has already asserted in public court that such interpretation by the court cannot occur, but now seeks to renege its previous assertion through its use of the term "constitutional convention." This cannot be allowed by this court. It would open a Pandora's box of amendatory procedure. Giving unlimited power to appellees whether it be for the court to consent to the appellees claim total amendatory control of the Constitution or through accepting a brief which improperly uses the term "constitutional convention" is not the constitutional nor American way of things.

Based on these points of well settled law, it is irrefutable that the Constitution, by including the term, "convention to propose amendments" or amendment convention while omitting the term "constitutional convention" makes the two terms two distinct constitutional subjects as they do not describe the same constitutional purpose. A "constitutional convention" unconstitutionally writes a new constitution, a power which falls outside the amendatory powers described by the Constitution and this is unconstitutional. An amendment convention proposes amendments to the present Constitution, a constitutionally permitted action. The

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[3] "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." Hawke v. Smith, 253 U.S. 221 (1920).

two purposes are distinct, exclusive and not interchangeable. Hence, as subjects of any brief before a court, they are neither interchangeable in text, meaning or intent.

The federal courts are created by the Constitution. The Constitution legitimizes the courts through specific constitutional language. The courts' judges are bound by constitutional oath and federal law to support the Constitution. Hence, no federal court can commit an unconstitutional act and be authorized by the Constitution as having the jurisdiction to do so. Therefore if an attorney presents the court unconstitutional material, the court cannot not admit it. To do so means the court not only violates its oath of office but travels beyond its constitutional limits of jurisdiction. Such is the case with the term "constitutional convention" used repeatedly by Ms. Utiger in her brief. The term exists outside the Constitution. It is not authorized by the Constitution. It is unconstitutional.

Thus, any reference used by any counsel in its brief before this court employing the term "constitutional convention" as intending to refer to the term used in Article V for an amendment convention must be stricken. Should a legal counsel consistently and repeatedly refer to a "constitutional convention" rather a convention to propose amendments or amendment convention as Ms. Utiger has done, it is manifest she cannot be referring to both types of conventions either interchangeably or simultaneously. Therefore a brief which discusses and refers to a "constitutional convention" as its subject matter cannot be said to be addressing the subject

of a convention to propose amendments when that subject is the legal subject before this court. Thus the brief submitted by Ms. Utiger does not address the subject matter, an amendment convention, a constitutional action authorized by the Constitution which is now before this court for its consideration. The only way the term “constitutional convention” can be properly used by Ms. Utiger would be in reference to the Constitutional Convention of 1787 which created the Constitution. Ms. Utiger’s references clearly do not convey that meaning.

The appellees have referred to the constitutional guarantees of due process as “patiently frivolous.” Consequently to be consistent, the position of the appellees must be that all other constitutional guarantees, which are nothing more than variations on the constitutional guarantee of due process of law, must also be in their view “patiently frivolous.” Such guarantees include separation of powers, sovereign immunity, separation of state and federal sovereignty and above all, the guarantee that the source of all sovereign power in America resides and emanates from the people. Such a posture of contempt by the appellees for the Constitution and the rights contained therein is itself contemptible and must be stricken by this court whenever that contempt appears. To attempt to use an unconstitutional term in order to continue an unconstitutional act committed by the appellees speaks volumes on the contempt appellees hold for the Constitution and for this court.

Finally, the subject matter before this court is an appeal of a decision reached in federal district court. This decision does not in anyway refer to a "constitutional convention." Instead the district court decision primarily relies on another ruling Walker v United States, C00-2125C (2001) from that same district court. This is no surprise as Walker v. United States was the first suit in United States court history to deal directly with the amendment convention clause of Article V. There was no other legal reference for the district court to refer to. No where in that historic decision, nor in Walker v. Members of Congress is the term "constitutional convention" used by the district court in its ruling. Instead the district court ruling specifically refers to a "convention to propose amendments" in Article V. Thus neither at district court level nor appellate level has the subject of this suit ever been a "constitutional convention." The district court obviously understood what subject matter was before it and Ms. Utiger should also. As it is clear she does not, her brief must be stricken as not addressing that subject.

Because the term "constitutional convention" refers to an entirely different subject, one which is excluded by the Constitution, and because the jurisdiction of this court is limited to subjects contained within the Constitution, any brief which discusses a "constitutional convention" cannot be considered or allowed to be part of this court's record. Motion is therefore made to strike the brief submitted by Ms. Utiger as it is addresses a subject, specifically a "constitutional convention", which

is outside the jurisdiction of this court and the Constitution, and fails to address the subject matter now before this court, a convention to propose amendments as authorized by Article V of the Constitution and the peremptory duty of appellees to call such an amendment convention as required by the Constitution.

Dated: March 28, 2005

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CERTIFICATE OF SERVICE

Case Name: Walker v. Members of Congress, et al.

Case No: 05-35023

I hereby certify that the person show below per her written request was served with a copy of motion by appellant to Strike Brief Submitted by Ms. Utiger of Department of Justice As Non-Responsive in Failing to Address Subject Matter of Suit.

Dated: March 28, 2005

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