05-35023

United States Court of Appeals

For the Ninth Circuit

Bill Walker, pro se

Appellant

v.

Members of Congress, et al.

Appellees

Reply Brief to Appellees' Answering Brief

Appellant hereby files a reply brief to appellees' answering brief in the above entitled suit. As appellant has addressed the fact the United States, represented by Ms. Karen D. Utiger of the Department of Justice, has not presented evidence required to present an answering brief to the court in another motion, he will not readdress that matter here. Instead, he will address the issues raised in the answering brief stipulating that his reply brief in no way mitigates his objections to appearance made in other motions.

The answering brief consistently refers to a "constitutional convention" and states appellant filed his complaint in district court based on the failure of Congress to call a "constitutional convention." This is not true. The district court did not rule on the calling of a "constitutional convention" nor did the appellant ever use the term in his suit (EOR, pp. 239-242[1]). A motion in this regard citing failure of the government to address the subject matter before this court has been filed and thus this matter will no longer be addressed. The term "convention" as used in this reply, shall refer to an amendment convention or convention to propose amendments as authorized by Article V of the Constitution.

It is also quite clear that as appellant objected to in an earlier motion, Ms. Utiger has not confined herself to evidence presented at the district court. She presents an entire new set of rulings, none of which the district court nor appellant

[1] EOR shall refer to appellant's Excerpt of Record already submitted to the court.

presented at district level. The appellate court is now faced with judging a new set of evidence rather than judging what was presented on appeal, making the court a court of original jurisdiction. Having brought this matter up in detail in a previous motion, appellant will only reassert his objection here.

In sum, the appellees through Ms. Utiger are asking the court to allow them to veto the Constitution. Appellant holds appellees should be required to obey the direct language of the Constitution. Appellees spend a great deal of time discussing the 16th Amendment attempting to somehow imply appellant holds the amendment is illegal or improper. No such allegation was ever made by appellant at district court. Instead, what appellant did maintain was that all constitutional language must be obeyed. The government on pages 8-9 of its brief clearly agrees with this point. It has effectively conceded the suit with this admission. Once the government concedes the 16th Amendment is valid and its constitutional language must be obeyed, how can it hold another part of the Constitution can be ignored and its constitutional language vetoed by those citizens that language is intended to regulate? The principal of collateral estoppel cited by Ms. Utiger also applies to her argument as well. Once she has conceded the language of the Constitution must be obeyed, then she is prevented from suggesting that the language cannot be obeyed. It is more than just well settled law that all subject to its jurisdiction must obey the Constitution and the members of Congress clearly fall under its jurisdiction. Ms.

Utiger apparently proposes two constitutions—one for her clients and one for the rest of us. This is not only "patiently frivolous" but unconstitutional as well.

There is no question that Congress has the power to legislate under powers granted it by constitutional amendments. But a convention call is not an amendment. It is a separate, independent, autonomous constitutional procedure for amending the Constitution. The Founders language designates the call as "peremptory." It is explicated stated Congress "shall have no discretion or option" regarding a convention call. This language makes it obvious the political question doctrine was not only anticipated by the Founders but also entirely rejected as well in regards to a convention call. It is well settled law that political question doctrine concerns which branch of government shall carry out constitutional directives; it is not a license to veto that language.

If the court does as the government requests, it will establish that Congress has the power to veto constitutional clauses without the benefit of amendment. It will establish court orders based on those clauses can be ignored. This will occur whether or not the court finds appellant has standing. As noted in his brief, appellant pointed out that if he does not have standing, the Constitution cannot have been effected by the district court order. The Constitution remains as it was before the court dismissed the suit. Thus, the district court erred in attaching political question doctrine for Congress in a convention call yet holding appellant had no

standing as this altered the Constitution putting the previously "peremptory" convention call into the discretionary hands of Congress.

The Supreme Court has ruled four separate times regarding a convention call. The Court did not discuss a convention call in Coleman v. Miller, 307 U.S. 433 (1939). Therefore such extension of the political question doctrine cannot be made using this case. That requires court jurisdiction, which the district court held it did not have. Then the district court exercised it jurisdiction anyway and this error of jurisdiction is what the appellees urge this court to accept. In sum, the district court erred. If it did not have jurisdiction it could not attach the political question doctrine to a convention call; it had to remain a peremptory act upon Congress. Where the convention call is specifically discussed, the Supreme Court has always held Congress must call. There has never been a single dissenting voice by any justice on this point. See Dodge v. Woolsey, 59 U.S. 331 (1855); Hawke v. Smith, 253 U.S. 221, (1920); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931). The most significant of these rulings are Hawke and Sprague. In Hawke the Court makes it clear that neither courts nor legislatures, national or state, may alter the amendment process saying, "The language of the article is plain and admits no doubt in its interpretation. It is not the function of the courts or legislative bodies, national or state, to alter the method which the Constitution has fixed." In Sprague, the Court noted the government itself asserted this

same position saying, “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 is true.”

The government in this suit now asks this court to ignore the plain language and insert the right of the government to veto it something specifically the Supreme Court has said cannot be done. See Sprague. Like the appellees in that case, the government asks that the phrase “Congress…shall call a convention to propose amendments if it thinks it has to but can refuse to do so if it wants” be inserted in Article V by the court. The Supreme Court stated the matter emphatically in Sprague:

> “Thus, however, clear the phraseology of article 5, they [appellees] urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, ‘as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment.’ *This can not be done.*”

It therefore asks the court to assume the jurisdictional right to amend the Constitution by edict. The government says (p. 9-10) “It makes no difference that taxpayer does not claim that the Sixteenth amendment was not properly enacted, but rather that a constitutional convention should have been called to consider its repeal.” It makes a great deal of difference. Those who challenge the validity of the 16th Amendment by refusal to pay income tax do not include appellant and do so at their peril. The evidence clearly shows appellant pays his income tax and requested a legal refund from the IRS. He was threatened with prison, a charge Ms. Utiger

does not refute. Such a challenge to the 16th Amendment was not made at district court and by raising it in the answering brief; Ms. Utiger again brings in new evidence.

The difference is an amendment convention is supported by direct constitutional language and therefore is as constitutionally valid as the 16th Amendment, which obviously Ms. Utiger maintains, must be obeyed. This concession alone defeats Ms. Utiger's entire argument. The government has not proven nor refuted that the states have applied in sufficient number to mandate that Congress call such a convention. Further, if there is any political question doctrine attached to a convention call, that is a decision as to whether a convention shall be called, the Constitution makes it clear that doctrine rests with the states, not Congress.

As to appellant failing to identify a basis for jurisdiction for his claim, the fact that the government refers to appellant as a "taxpayer" and does not refute his Flast doctrine assertion made both in district court and appellate court by itself provides a basis of jurisdiction. Beyond which appellant presented several federal statutes providing jurisdiction as a taxpayer at district court. See EOR, pp. 200-230. As discussed in his brief, (p.12) the Flast doctrine does apply because as the Supreme Court has ruled, a taxpayer has standing if he alleges congressional action under its taxing and spending clause is in derogation of a constitutional provision which operates to restrict the exercise of that power. Obviously the amendatory

provisions are intended to operate to restrict that exercise of power and hence fall under the terms of the Flast doctrine. Further, appellant presented several basis of standing both as to a taxpayer and as a citizen, which the answering brief fails to address or refute. The conclusion therefore must be Ms. Utiger does not dispute these standings.

Most notable among these assertions is standing claimed under 42 U.S.C. 1983. As noted by the appellant at district court, the district court did not dispute nor deny in its order to show cause that jurisdiction and standing were established by this claim. The district court ignored the claim entirely as has Ms. Utiger. It is clear that the actions of appellees in refusing make a convention call, due to the unique nature of state court rulings and state law, violate state law. See EOR, pp. 120-133. Ms. Utiger has not even mentioned this standing in her answering brief and thus the court must conclude she does not raise objection to it.

Ms. Utiger attempts to suggest the suit should be dismissed due to improper service by appellant. Appellant has addressed the issue of service in more detail in an accompanying motion but will add the following: all members of Congress have at least two residences, one in their state and one in Washington D.C. Further they have an official public address. Moreover, to the best knowledge of appellant, all members of Congress employ at their appointment, personal legal counsel for their exclusive, individual use who are authorized to receive such waivers. The waivers

were sent and so marked by appellant so that it was clear these waivers should be handled by such legal counsel or the member of Congress individually. Clearly this satisfies the issue of service raised by Ms. Utiger. Beyond which, the language of the waivers makes it clear that whomever purports to represent such individuals is required to return the waivers. If, as Ms. Utiger intimates, she is appellees' representative, then it is her responsibility to have returned the waivers to appellant, which she has failed to do. This leads to the conclusion she does not represent them and therefore has no business appearing for them.

As to Ms. Utiger's claim that "taxpayer failed to point to any administrative claim for refund filed by him," the evidence, (EOR, pp. 212-213) shows he filed a claim with the IRS. In that letter he requests "forms or other materials requiring completion before consideration," of his request. In the IRS reply, (EOR, p. 215) the IRS makes it clear there will be no further correspondence and hence did not send any information or administrative forms to be completed by appellant. Therefore it is clear the IRS considered such administrative forms unnecessary.

Further appellant made claim under 28 U.S.C. 2679 which not only permits standing if the claim is based on a constitutional violation but demands that such actions of appellees must be certified as within the scope of the duties of office by the Attorney General. Ms. Utiger has failed to provide such certification to this court and therefore the court, by statute, must conclude the actions of the appellees

are not a duty of office and therefore do not fall under the protection of the immunities citied by Ms. Utiger in her brief.

The Constitution only offers immunities to officials and other government officers when they act in compliance with the Constitution. As noted in appellant's brief, (EOR, p. 176-177, 188) there are no constitutional immunities for officials not complying with constitutional provisions. Further, it is well settled law since Hollingsworth v. Virginia, 3 U.S. 378 (1798) that the amendment process is not a legislative function and therefore does not fall under the speech and debate clause immunity or legislative function immunity.

Appellant could continue refuting Ms. Utiger point by point, but this suit this hinges on a simple, single question: does the government have to obey the direct language of the Constitution or can it simply veto it at its political whim? Ms. Utiger says that if that language is the 16th Amendment, it must be obeyed but holds that if it is an Article V amendment convention call, it does not. The equal protection clause as well as the supremacy clause, both of which will have to be voided should appellant lose this case, state otherwise. Congress cannot veto the Constitution and its actions cannot be considered constitutional if they obey one portion of the Constitution but violate another portion by refusing to obey it.

The issue was best summed up in Marbury v. Madison, 5 U.S. 137 (1803):

"It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution

by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. … Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintained that the courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare than an act, which, according the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction."

Ms. Utiger asks the court close its eyes to the Constitution of the United States and allow appellees to veto its language. Appellant asks the court to compel the government to obey the direct, plain language of the document. It is up to this court to decide whether the Constitution remains supreme or not. Either way a decision will be reached; there is no middle ground.

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 shown below per her written request was served with two copies of appellant's reply brief to appellees' answer brief and that an original and fifteen copies of this reply brief have been transmitted to the Ninth Circuit Court of Appeals in the above entitled suit.

Dated: March 28, 2005

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