ROBERT C. BUNDY
United States Attorney

Susan Lindquist
Assistant U.S. Attorney

Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9
Anchorage, Alaska 99507
(907) 271-5071

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

GORDON WARREN EPPERLY, Plaintiff, vs. JOHN W. CARLIN, ARCHIVIST OF THE UNITED STATES Defendant.	)	No. 597-025 Cv. (HRH) UNITED STATES' RULE 12(b) (6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW Defendant, John W. Carlin, Archivist of the United States, through counsel, and moves to dismiss this case pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss this case for failure to state a claim on which relief can be granted. Gordon Warren Epperly ("Epperly") is not entitled to an Order in the nature of Mandamus because the Archivist of the United States is not authorized to investigate the validity of the States' ratification of amendments to the Constitution. Further, Epperly is not entitled to declaratory judgment declaring which Officer

---

or Department has authority to investigate the validity of States' ratification because such determination is a non-justiciable political question. Finally, Epperly is not entitled to an Order in the nature of Mandamus because the United States has not waived sovereign immunity.

STANDARD OF REVIEW

A district court considering a motion to dismiss based on lack of jurisdiction is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. See, Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 1011 n.4, 91 L.Ed. 1209 (1947). In such circumstances, "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill Pub. Co.. Inc. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979) quoting Mortensen vs. First Federal. Say. and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977).

STATEMENT OF THE FACTS

Epperly challenges the validity of the Fourteenth Amendment to the United States Constitution /1 alleging that the requisite

---

1/ To the extent that Epperly challenges the Fifteenth or other Amendments, the same arguments apply.

---

number of States failed to ratify. Epperly first brought this claim in the U.S. District Court for the District of Columbia on May 10, 1990, which transferred the case sua sponte to the U.S. District Court for the District of Alaska. On October 24, 1990, the District Court allowed Epperly to file an amended motion which complied with the court's rules and was not frivolous. Epperly's amended complaint, filed on November 2, 1990 alleged, among other things, that the Internal Revenue Code did not apply to him because he was not a United States citizen within the meaning of the Fourteenth Amendment, as that amendment was never validly ratified. On April 30, 1991, that court determined that Epperly failed to state a claim on which relief can be granted and found his complaint to be frivolous. Epperly v. United States 590-010, (D. Alaska April 30, 1991).

Epperly filed an appeal in the Ninth Circuit Court of Appeals which affirmed the District Court's dismissal and imposed sanctions in the amount of $2500 against Epperly for bringing a meritless appeal. Epperly v. United States, No. 91-35862 (9th Cir. Nov. 6, 1992). Finally, Epperly petitioned the Supreme Court of the United States for certiorari, which was denied on

October 4, 1993. Epperly v. United States, 510 U.S. 867 (1993).

Epperly next filed a complaint in the United States Court of Federal Claims, again challenging the validity of the Fourteenth Amendment. On April 17, 1995, that court dismissed the claim for lack of jurisdiction under the Tucker Act. Epperlv v. United States, No. 95-281, (Ct. C1. April 17, 1995).

On June 11, 1997, the National Archives and Records Administration (NARA) received a letter, addressed to John W. Carlin, Archivist of the United States (Archivist), submitted by Epperly as an information in the nature of quo warrento. The letter demanded the Archivist to formally investigate the ratification of the Fourteenth and Fifteenth Amendments and to issue a proclamation declaring them void if the investigation revealed that they were not validly ratified. See Complaint, Exhibit E.

NARA responded in writing to Epperly's request on June 28, 1997, explaining that the Archivist was only authorized to certify amendments. The agency further explained that Congress, not the Executive branch, has the authority to determine whether an amendment has been validly ratified. See Complaint Exhibit F.

On August 4, 1997, Epperly again wrote to NARA, demanding the Archivist to investigate the validity of the Amendments. He granted ten days to carry out such an investigation, stating that he would submit a petition for an Order in the nature of a Writ of Mandamus if the Archivist failed to comply. See complaint Exhibit G. NARA sent one final letter to Epperly on August 15, 1997 reiterating the extent of the Archivist's authority previously explained in the June 28 letter. Epperly then filed the instant matter on September 3, 1997.

ANALYSIS

I. EPPERLY IS NOT ENTITLED TO AN ORDER IN THE NATURE OF MANDAMUS BECAUSE THE ARCHIVIST IS NOT AUTHORIZED TO INVESTIGATE THE VALIDITY OF THE STATES' RATIFICATION OF AMENDMENTS TO THE CONSTITUTION.

The Archivist's authority to certify amendments to the United States Constitution is derived from 1 U.S.C. ss 106(b). Congress explicitly granted the Archivist the authority to publish a certificate stating that an amendment has become valid as a part of the Constitution. 1 U.S.C. ss 106(b). This authority is ministerial, limited to certifying whether the requisite number of States have adopted the proposed amendment.

U.S. ex re: Widenmann v. Colby, 265 F. 998, 49 App. D.C. 358, aff'd, 257 U.S. 619 (1920). Neither the Archivist nor his predecessors /2 have had the expanded authority to determine the validity of the States' ratification. Leser v. Garnett, 258 U.S. 130, 137 (1922); Widenmann at 999. In Leser, the Supreme Court held that the Secretary of State (Secretary) was obligated to certify that the requisite number of states had ratified the Nineteenth Amendment thereby proclaiming it a valid part of the Constitution. Leser at 137. The Court specifically stated that official notice of the States' ratification was conclusive on the Secretary. Id. Similarly, in Widenmann, the Court of Appeals of the District of Columbia, affirmed by the Supreme Court, found that it was the Secretary's duty to accept official notice of ratification from the States and subsequently certify that the Eighteenth Amendment was a valid part of the Constitution.

2/ The Secretary of State and the Administrator of General Services previously were charged with the authority to certify Constitutional amendments.

Widenmann at 999. The court further found that the Secretary "was not required, or authorized, to investigate and determine whether or not the notices stated the truth. To accept them as doing so, if in due form, was his duty." Id.

Regardless, Epperly is asking this court to rule against precedent and order the Archivist to investigate the validity of the States' ratification. However, as in Widenmann and Leser, there is no legal basis for Epperly's claim. In both of those cases and the instant matter, the Archivist (or Secretary) properly fulfilled his duties under 1 U.S.C. ss 106(b) by issuing a proclamation when three-fourths of the States ratified the various Amendments. The Widenmann court explained that mandamus was not appropriate because the Secretary fulfilled his duty by issuing a proclamation. Id. The court noted that mandamus would be appropriate if the Secretary failed to perform his duties by not issuing a proclamation. Id. at 1000. For the same reasons, mandamus is inappropriate in the instant matter. Any duty the Archivist might have in this case was fulfilled when the Secretary certified ratification of the Fourteenth Amendment.

Furthermore, the Archivist does not have the authority to invalidate an amendment. An amendment becomes effective on the day the requisite number of States ratify. Dillon v. Gloss, 256 U.S. 368, 376 (1920). Even if the Archivist were to revoke certification of an amendment, that amendment would remain valid

and in effect. Widenmann at 1000. The validity of an Amendment depends only upon ratification by three-fourths of the States,

---

not the Archivist's proclamation. Id. For example, an Amendment is deemed valid on the day three-fourths of the States ratify, regardless of when the Archivist issues a proclamation of validity. See Dillon (The Eighteenth Amendment was effective on January 16, 1919, the date on which the requisite number of States ratified even though the Secretary did not issue a proclamation until January 29, 1919). Thus, the Archivist has no power to invalidate an amendment. As such, Petitioner's request for mandamus would not grant him the relief he seeks.

II. DECLARATORY JUDGMENT ON WHICH OFFICER OR DEPARTMENT HAS AUTHORITY TO INVESTIGATE THE RATIFICATION OF THE STATES' RATIFICATION IS A NON-JUSTICIABLE POLITICAL QUESTION.

Petitioner Epperly asks this court to declare which officer or department is responsible for investigating the validity of the States' ratification. In his previous claim, the Ninth Circuit Court of Appeals determined that the question of whether the Fourteenth Amendment has been properly ratified is a political question that the courts do not address. Epperly v. United States, No. 91-35862 (9th Cir. Nov. 6, 1992), cert. denied, 510 U.S. 867 (1993). Similarly, the question he raises now constitutes a political question relating to the functions of the legislative branch of government.

In Coleman v. Miller, 307 U.S. 433, 450 (1939), the Supreme Court held that the validity of ratifications regarding previous rejection or attempted withdrawal is a political question within the ultimate authority of Congress. Regardless, Petitioner's

---

challenge to the Fourteenth Amendment is premised on his contention that several states failed to properly ratify due to previous rejection or attempted withdrawal. /3 Although Petitioner is not asking the court to determine the validity of the States' ratification, he is asking the court to declare an officer or department authorized to determine the validity. By endeavoring to answer this question, the courts would infringe on Congress' exercise of control over the promulgation and adoption of

amendments.

Similarly, the Supreme Court, in Field v. Clark, 143 U.S. 649 672 (1892), noted that the courts are reluctant to consider whether the Legislature passes statutes with all requisite formalities. The Court cited the need for finality and the certainty of a statute's status as well as the need to accord respect to the equal and independent branches of government. Id. Finally, the Supreme Court has stated, "[t]he political question doctrine, a tool for maintenance of governmental order, will not be so applied to promote only disorder." Baker v. Carr, 82 S. Ct. 691, 709 (1962). The Court made this statement having decided not to apply the political question doctrine. However,

---

3/ In his Information in the nature of quo warrento, Epperly asserted his theories on why the Fourteenth Amendment was not properly ratified. First, he contended that the Senate improperly refused to seat Senator John P. Stockton of New Jersey and therefore Senator Stockton was not considered in calculating how many senators constituted a majority. Information in the nature of quo warrento, p.8. He also contended that, although Ohio and New Jersey originally adopted the Amendment, theirsubsequent recision constituted an effective rejection. Id. at 10.

---

the message is clear: the Court would not allow the doctrine to be used as a means of promoting disorder. This can be applied to the instant matter. Granting Petitioner Epperly's request would not only invade the province of Congress, but would also inject uncertainty and disorder into our legislative system.

III. THE UNITED STATES HAS NOT WAIVED SOVEREIGN IMMUNITY.

To be subject to suit, the United States or its instrumentality, must expressly waive sovereign immunity. Lane v. Pena, 116 S. Ct. 2092, 2096 (1996). Any such waiver will be strictly construed in favor of the United States. Id. Petitioner brings this action pursuant to 28 U.S.C. ss 1361. However, ss 1361 does not constitute a waiver of sovereign immunity. Smith v. Grimm, 534 F.2d 1346 (9th Cir.), cert.

denied, 97 S. Ct. 493 (1976). Section 1361 authorizes jurisdiction over mandamus actions when the relief sought governs ministerial duties of the United States or its officials. Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988). Mandamus jurisdiction may not be invoked where the governmental duty in question is discretionary. Id.; Kennecott Copper Corp., Nevada Mines Dev.. McGill. Nev. v. Costle, 572 F.2d 1349 (9th Cir. 1978).

Petitioner Epperly is not entitled to the type of relief he requests under 28 U.S.C. ss 1361 because his request for mandamus governs a discretionary function. While receiving and certifying official notice of ratification is a ministerial, non-discretionary duty, investigating the validity or process behind

---

the notice implicates discretionary action.

The only ministerial duty the Archivist performs is the certification of the States' ratification. Had the Archivist failed in this duty, mandamus would be an appropriate action. However, since this duty was fulfilled well over 100 years ago, an order in the nature of mandamus is no longer appropriate. Therefore, Petitioner is not entitled to relief under 28 U.S.C. ss 1361. Furthermore, absent jurisdiction under ss 1361, Petitioner may not bring suit because the United States has not expressly waived sovereign immunity in this case.

Respectfully Submitted on November 21, 1997,

ROBERT C. BUNDY
United States Attorney

/s/ Lindquist
SUSAN LINDQUIST
Assistant U.S. Attorney