IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

RONALD J. CALZONE Plaintiff, vs. RONALD F RICHARD, Missouri Senate President pro tem and ROBERT TODD RICHARDSON, Missouri House of Representatives Speaker	)	CASE NO. _____

SUGGESTIONS IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

INTRODUCTION

The question before the court is exceedingly simple: Is the General Assembly obligated to support Article IV, Section 8 of the Missouri Constitution when using a Senate ***Concurrent*** Resolution to apply to Congress for a constitutional convention, or not?

In that section, the People of Missouri place a straightforward constraint on the power of the legislature – a requirement that "every resolution to which the ***concurrence*** of the senate and the house of representatives may be necessary, except on questions of adjournment, going into joint session, and of amending this constitution, **shall be presented to the governor**..."

Emphasis added. Exceptions to the rule are plainly listed, but those exceptions clearly don't relate to an application to Congress for a constitutional convention.

Section 8 also stipulates that such concurrent resolutions "be proceeded upon in the same manner as in the case of a bill...", which includes the veto process.

Specifically at issue is the 2017 **Senate Concurrent Resolution 4**, but that measure is only one example of what has become a troubling trend by the General Assembly of ignoring plain constitutional limits on their power.

STATEMENT OF FACTS

A. *Legislative Vehicles*

In addition to bills, there are at least six vehicles to carry legislation in the Missouri General Assembly:

1. House Joint Resolutions
2. Senate Joint Resolutions
3. House Concurrent Resolutions
4. Senate Concurrent Resolutions
5. House Resolutions
6. Senate Resolutions

The first four vehicles each require passage in the originating chamber, and subsequent consideration and passage in the second chamber, and a conference to resolve any amendments approved by one chamber and not the other, followed by final votes on the finished product, if it is not exactly the same as versions previously approved. That process is what the Constitution calls "concurrence."

The latter two vehicles, House Resolutions and Senate Resolutions, do not require action from the opposite chamber. In other words, **no concurrence is required**.

B. *Senate Concurrent Resolution 4*

Senate Concurrent Resolution 4 is an application to Congress, pursuant to Article V of the U.S. Constitution, for a convention to propose amendments to the U.S. Constitution.

As the name makes obvious, Senate Concurrent Resolution 4 required, and received, the concurrence of both the Senate (the originating chamber) and the House. Although amended in the Senate, once it was perfected there, no changes were made by the House, so once the House accepted the Senate version, no additional votes were required by the Senate.

C. *Some Concurrent Resolutions are presented to the Governor and some are not.*

Historically, some House and / or Senate Concurrent Resolutions are presented to the Governor and otherwise proceeded upon in the same manner as a bill, and some are not. For instance, in 2015, SCR 1, and in 2016, SCR 46, and SCR 50 were all presented to the Governor, but SCR 42 and SCR 43 were not presented to the Governor. Exhibits B, C, D, E and F.

Each of the Concurrent Resolutions which were sent to the Governor included a statement in the body (typically the last clause) instructing the Secretary of the Senate or the Chief Clerk of the House to present the resolution to the Governor, among other tasks.

Each of the Concurrent Resolutions which were NOT sent to the Governor had NO instruction to the Secretary of the Senate or the Chief Clerk of the House to present the resolution to the Governor.

On information and belief, that pattern has been the same for years.

D. *With three exceptions, the Missouri Constitution requires concurrent resolutions to be presented to the Governor for his consideration, at which time he may choose to veto, sign, or ignore it.*

Article IV, Section 8 of the Missouri Constitution says:

> "Every resolution to which the **concurrence of the senate and house of representatives may be necessary**, except on questions of *adjournment*, going into *joint session*, and of *amending this constitution*, **shall be presented to the governor**, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill; provided, that no resolution shall have the effect to repeal, extend, or amend any law." Emphasis Added. *Missouri Constitution Article IV Section 8*

In 2016, neither SCR 42 nor SCR 43 related to the three exceptions.

E. *Article V of the U.S. Constitution provides for applications to Congress from state legislatures.*

Article V of the U.S. Constitution says:

> "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 the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate." Emphasis Added.

STANDARD OF REVIEW

For the purposes of granting temporary or preliminary relief, this court must consider "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). While the movant bears the burden of demonstrating the existence of these factors, "[n]o single factor in itself is dispositive," *Baker Elec. Coop., Inc. v. Chaske,* 28 F.3d 1466, 1472 (8th Cir. 1994) (internal quotation marks omitted), and Plaintiff does not even need to show a "fifty percent chance of" success on the merits, *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007) (internal quotation marks omitted). Once a movant demonstrates this likelihood of success on the merits, this court may presume that he has been irreparably harmed. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc*., 815 F.2d 500, 505 (8th Cir. 1987).

ARGUMENT

I. The Constitution is unambiguous.

Article IV, Section 8 of the Missouri Constitution speaks for itself – SCR 4 *did* require concurrence of both the House and Senate, and it is neither a question of adjournment, an action to take the legislature into joint session, nor does it seek to amend the *state* constitution. The exceptions to the unambiguous general rule are equally unambiguous, including their application – or lack of application – to SCR 4.

The analysis should stop with that simple argument on a simple issue since it would take some **judicial gymnastics** to conclude that any concurrent resolution outside the three specific exceptions can escape the requirement to be presented to the Governor.

II. The Supreme Court stretched their credulity in 1957.

Well, the Missouri Supreme Court had their gym shorts on in 1957 when they wrote the strained opinion in *State v. Atterbury*, 300 SW 2d 806 (Mo. banc 1957). In that opinion, the Court appealed to the constitutions of Illinois, Alabama, Kentucky, and especially Maine to supply words that the People of Missouri saw fit to leave out of their own Constitution. *Id.* at 814-815.

The Court found significance in the fact that Maine Constitution's clause most similar to Missouri's Article IV § 8 read, "Every bill or resolution *having the force of law*, to which the concurrence of both Houses may be necessary, except on a question of adjournment, which shall have passed both Houses, shall be presented to the Governor..." *Id.* at 815. The phrase "having the force of law" is, of course, not part of the Missouri's Article IV § 8. In fact, it is not even implied by the context.

The 1957 opinion went on to say:

> We believe that the constitution of Maine expresses what is implied in the Missouri constitution when it limits the resolutions that have to be submitted to the governor to those "*having the force of law*." (Emphasis supplied.) It is our conclusion and holding that joint resolutions, as that term is used in art. III, § 31, and the concurrent resolutions mentioned in art. IV, § 8, are those resolutions which have the force and effect of law. **In this view we are further supported by the distinction drawn between legislative and procedural acts** in *Gilbreath v. Willett*, 148 Tenn. 92, 251 S.W. 910, 28 A.L.R. 1147, and *Attorney General v. Brissenden*, 271 Mass. 172, 171 N.E. 82.
>
> Bold supplied. *Id.* at 817.

Interestingly, the 1957 Missouri Supreme court chose to draw a distinction that the ***framers*** certainly DID NOT paint with the words they selected for Article IV § 8. More contemporary Supreme Court opinions seem to militate against the sort of rationalization used by the 1957 Court. "This Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *City of Arnold v. Tourkakis*, 249 S.W.3d 202,

206 (Mo. banc 2008). "When words do not have a technical or legal meaning, 'they must be given their plain or ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision.'" *Mo. Prosecuting Attorneys v. Barton Cnty*., 311 S.W.3d 737, 742 (Mo. banc 2010). State v. Honeycutt, 421 SW 3d 410 (Mo. Banc 2013), citing *Tourkakis* and *Barton County*.

III. Even the strained opinion in *State v. Atterbury* supports the Plaintiff's position.

"The question, then, is whether Senate Concurrent Resolution No. 10 has the force and effect of law." *State v. Atterbury*, 300 SW 2d 806, 817 (Mo. Banc 1957)

"Generally, it may be said that a legislative body uses a resolution to *express an opinion* or purpose with respect to a given matter or thing and it is *temporary in nature*, while a law is intended to direct and control *permanently matters* applying to persons and things in general. " Emphasis added. *Id.* at 817.

"It is our opinion that the resolution presently before us, Senate Concurrent Resolution No. 10, is *administrative or procedural* in character and that it does not have the *force and effect of law*. Its submission to the governor was not required by the constitutional provisions in question." Emphasis added. *Id.* at 817.

If we are to accept the 1957 Court's strained opinion, the question in *Atterbury* would also be the question to answer in the instant case, namely, whether Senate Concurrent Resolution 4 is "*express[ing] an opinion*" or is it "*administrative or procedural in character*", or, on the other hand, does it have the "*force and effect of law*"?

OR, is there yet another category in which the character of a resolution is more

than administrative but not quite what one would consider as having "the force of law"? One might ask if SCR 4 was **internal house-keeping** business of the legislature, or does it **have broader reach**?

The People clearly take amending the U.S. Constitution seriously. So much so, in fact, that they have NOT entrusted ratification of proposed amendments to the General Assembly. Article I § 4 requires proposed amendments "affecting the the individual liberties of the people" to be "submitted to conventions of the people."

Therefore, it is reasonable to conclude that the legislature making application to Congress for a constitutional convention is more than internal house-keeping – it is more than "*administrative or procedural in character.*" It is certainly not "*temporary in nature.*"

But, does an application to Congress for a constitutional convention carry, in some way, the "*force of law*"?

IV. Senate Concurrent Resolution 4 carries the force of law.

A 2002 opinion from the Missouri Court of Appeals, Western District, resolved some differences between some state legislators, organizations, and state employees and Governor Holden over an executive order. Therein, the court classified executive orders into three categories:

1. Formal, ceremonial, and political orders.
2. Communications to subordinate executive branch officials regarding the execution of their executive branch duties.
3. Orders with "the force of law."

Kinder v. Holden, 92 SW 3d 793, 806 (2002)

The Western District court explained executive orders with the "force of law" this way:

> Governor may require information from officers of the Executive Department regarding any subject relating to the duties of their respective offices. If the Governor issued an order **requiring information** from an officer of the Executive Department and such officer refused, the Governor **could obtain a court order** and the sanctions of noncompliance with a court order to enforce the executive order. "The distinction between this third classification and the second classification is **based upon the presence of some constitutional or statutory provision, which authorizes the executive order** either specifically or by way of necessary implication." Internal citations omitted. Emphasis added. *Id.* at 806.

And:

> Although the executive order in McCulloch was not categorized by the court in that case, it seems clear that it would have been considered in the third classification of executive orders that have the force of law **due to the constitutional and statutory provisions authorizing it**. Emphasis added. *Id.* at 807.

It is generally understood that Article V of the U.S. Constitution is one way the several states can exercise rightful authority over the federal government, including Congress, to wit, largely control the amendment process. The Missouri legislature is certainly *constitutionally authorized* to apply to Congress for a convention under Article V of the U.S. Constitution, and that application has the *force of law* as part of the 2/3s of the states making similar application. (e.g. "Congress... shall call a convention..." *U.S. Const., Article V*)

Closer to home, one might also argue that SCR 4 is the legislature's order to an officer of the legislature, the Secretary of the Senate, who could be the subject of a court order if she refused to follow the instructions to her in the resolution.

V. The purpose and use of concurrent resolutions is not the same in all jurisdictions.

One of the pitfalls of projecting words and meanings from other jurisdictions' constitutions into the meaning of Missouri's Article IV § 8. (e.g. "force of law" from the Maine Constitution) is that the framers and ratifiers may have an entirely different intent for the use of their legislative vehicles. For example, "Concurrent Resolutions" in the U.S. House and Senate are not ever supposed to carry the force of law, while Missouri's clearly do at times.

From the U.S. Senate's website:

> "Concurrent resolutions, which are designated H.Con. Res. or S.Con. Res., and followed by a number, must be passed in the same form by both houses, but they **do not require the signature of the president** and **do not have the force of law.** Concurrent resolutions are generally used to make or amend **rules that apply to both houses**. They are also used to **express the sentiments** of both of the houses. For example, a concurrent resolution is used to set the time of Congress' **adjournment**. It may also be used by Congress to convey **congratulations** to another country on the anniversary of its independence. Another important use of the concurrent resolution is for the annual congressional budget resolution, which sets Congress' revenue and **spending goals** for the upcoming fiscal year." Emphasis added.
> See:
> https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm
> Last visited May 19, 2017.

Framers of the Missouri Constitution certainly did not follow that pattern with respect to the use of concurrent resolutions, and they made no distinction between resolutions carrying the force of law and any other resolution when they built in the presentation requirement. Consequently, the situations are not analogous.

VI. The Missouri Constitution is not in conflict with Article V of the U.S. Constitution's application clause.

It might be argued that any state law that made it impossible for the legislature to unilaterally apply to Congress for a constitutional convention would run afoul of the Supremacy

Clause. Although the Plaintiff is not conceding that point, he does want to make the case that such is not the case in Missouri.

While Article IV § 8 makes it clear that concurrent resolutions require presentation to the Governor, the same is NOT true of House Resolutions and Senate Resolutions. The General Assembly could have chosen to send identical House and Senate resolutions to Congress, independent of any action by the Governor, and completely fulfilled the purpose of Article V of the U.S. Constitution WITHOUT violating the Missouri Constitution.

VII. Political dynamics affect concurrent resolutions and House or Senate Resolutions differently.

It is presumptuous for a court to assume that there is no difference in the ease or difficulty, or other considerations, with respect to passing the various types of resolutions.

If anything, the legislative process is dynamic and unpredictable. At times there may be reasons a concurrent resolution is actually easier to pass than a House or Senate Resolution. For instance, one chamber may not want their "name" to be the only name on some piece of legislation, but they may feel there is safety in numbers. Only after one makes a move will the other make a commitment.

Other times, one chamber will pass what they know is an imperfect piece of legislation with the assumption the other chamber will "fix it."

In any event, it not appropriate for this or any other court to go beyond or fall short of constitutional mandates as simple as "Every resolution to which the concurrence of the senate and house of representatives may be necessary, except on questions of adjournment, going into joint session, and of amending this constitution, shall be presented to the governor..."

VIII. Missouri courts can't control Congress. Irreparable harm will be done if Article IV § 8 is ignored.

There is no certainty that once Missouri sends an application for a constitutional convention that bell can be unrung. Missouri courts can't control Congress and how Congress counts applications toward the 2/3 requirement of Article V.

IX. If SCR 4 need not be presented to the Governor, there is no rush, and no harm done the Defendants if Plaintiff's motion is granted.

If Defendants are right and presentation to the Governor is not required, they have no real time limits on when they must transmit the resolution to Congress. On information and belief, the Speaker and Pro tem can sign SCR 4 at will and hold it until the courts resolve this matter.

CONCLUSION

There is a very real possibility that Plaintiff, and all Missourians who care about the fidelity of the legislative process, will suffer irreparable harm if the General Assembly is allowed to ignore Article IV § 8. On the other hand, Defendants have little to lose from a restraining order or preliminary injunction. From the foregoing there is no doubt that there is a reasonable likelihood, even probability, of Plaintiff's success. And lastly, what could possibility be more in the public's interest than ensuring the chains and fences they placed on and around the government they created are intact and respected?

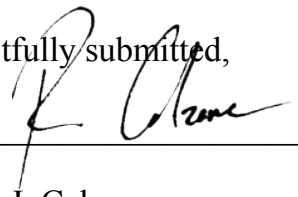
Both a temporary restraining order and preliminary injunction are very much in order.

WHEREFORE, Plaintiff requests this Court:

A. Enter a temporary restraining order that prohibits Defendants and their agents from transmitting Senate Concurrent Resolution 4 (2017) to Congress or the several states.

B. Enter a preliminary injunction that prohibits Defendants and their agents from transmitting Senate Concurrent Resolution 4 (2017) to Congress or the several states.

Respectfully submitted,



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Certificate of Service

I, Ronald J. Calzone, do hereby certify that a true and correct copy of the foregoing petition was served in person and also provided to the Cole County Sheriff on, May 19, 2017, to be served on each of the following defendants.

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