UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG,	)	
	)	Civil Action No. 1:10-cv-02040
Plaintiff,	)	(RWR-JWR-CKK)
	)	
v.	)	THREE-JUDGE COURT
	)	
FEDERAL ELECTION COMMISSION, and	)	
THE UNITED STATES,	)	
	)	
Defendants.	)	
	)	

DEFENDANT THE UNITED STATES'S MOTION TO DISMISS

The United States ("Defendant" or "United States"), by and through undersigned counsel, hereby respectfully moves this Court, pursuant to Fed. R. Civ. P. 12 (b)(1) and 12(b)(6), to dismiss Plaintiff's claims against the United States.[1] As set forth in detail in the following memorandum in support of this motion, Plaintiff's claims against the United States should be dismissed on the following grounds: (1) Plaintiff lacks standing; (2) Plaintiff's claim is barred by sovereign immunity; (3) the Members' Representational Allowance ("MRA") and earmark legislation do not violate Plaintiff's Fifth Amendment Rights or the Compensation Clause of Article I; (4) Plaintiff's claim is barred by the political question doctrine; and (5) Plaintiff's claim fails as a matter of law on the merits.

[1] Defendant Federal Election Commission is proceeding separately in this matter.

For these reasons, and those stated in Defendant's memorandum in support, filed herewith, the Defendant respectfully requests that the Court dismiss Plaintiff's claims against it with prejudice.

Date: March 15, 2011

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT UNITED STATES'S MOTION TO DISMISS

Defendant, the United States, by and through its attorneys, hereby submits its memorandum in support of its motion to dismiss Plaintiff's complaint.

STATEMENT OF THE CASE

I. Introduction

Pro se Plaintiff Steven Schonberg filed this action against the United States and the Federal Election Commission ("FEC"), complaining that the incumbent Representative for the House of Representatives for the 6th district of Florida ("Rep.FL6") had and has an illegal advantage over Plaintiff's former 2010 candidacy and his potential 2012 candidacy for the 6th district of Florida in the U.S. House of Representatives because Rep.FL6 is the beneficiary of allegedly unconstitutional legislative earmarks and a Members' Representational Allowance("MRA"), which Rep.FL6 allegedly uses to fund his election campaigns; in 2010 and 2012, Plaintiff had and has no such alleged election assistance. See Second Amended Complaint ("Sec. Am. Compl.") generally.

Plaintiff seeks injunctive relief to enjoin "all assets of all campaign committees under the

authority of FEC and "order the funds returned to donors or the proper disposition of the funds can be ordered by the Court." See Compl. § XV ¶¶ C-D. Plaintiff also seeks to have the MRA and legislative earmarks declared unconstitutional. Id. ¶¶ E-H.

Plaintiff's claims are without any legal merit, and his suit against the United States should be dismissed on threshold grounds for failure to state a claim as a matter of law. First, Plaintiff lacks Article III standing as the complaint fails to plead facts that, if true, could demonstrate that Plaintiff had suffered any concrete injury to a legally protected interest that is fairly traceable to the United States, and which is likely to be redressed by a favorable judicial decision. Second, Plaintiff has not alleged any facts that establish that this Court has subject matter jurisdiction over the United States because Plaintiff's claim against the United States is barred by the doctrine of sovereign immunity, and Plaintiff's claim is a non justiciable political question. Finally, Plaintiff's claim that the MRA and legislative earmarks are violations of his Fifth Amendment Due Process Rights and the Compensation Clause is without merit. For these reasons, Plaintiff's claims against the United States should be dismissed.

II. Procedural Background

On November 24, 2010, Plaintiff filed his original complaint against the FEC, along with his motion for a three-judge court to be convened. (Dk. Entry Nos. 1 and 2). On December 9, 2009, the United States Court of Appeals ("USCA") filed an Order granting Plaintiff's motion for the designation of Circuit Court Judge Judith W. Rogers and District Court Judges Colleen Kollar-Kotelly and Richard W. Roberts to hear and determine the case. (Dk. Entry No. 6).

On December 23, 2010, the FEC filed a motion to dissolve the Three-Judge Court. On December 27, 2010, Plaintiff filed his First Amended Complaint against the FEC, and added the

United States as a party. (Dk. Entry No. 13). On January 18, 2011, the United States entered its appearance in the case. After the Court ordered the parties to file a joint status report proposing briefing deadlines and a deadline for Plaintiff to file his Second Amended Complaint, Plaintiff, on February 15, 2011, filed his Second Amended Complaint (Dk. Entry No. 31).

ARGUMENT

III. Legal Principles

A. Dismissal Pursuant to Rule 12(b)(1) for Lack of Jurisdiction

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be presented as a facial or factual challenge. "A facial challenge attacks the factual allegations of the complaint that are contained on the face of the complaint, while a factual challenge is addressed to the underlying facts contained in the complaint." Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (internal quotations and citations omitted). When a defendant makes a facial challenge, the district court must accept the allegations contained in the complaint as true and consider the factual allegations in the light most favorable to the non-moving party. Erby v. United States, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). With respect to a factual challenge, the district court may consider materials outside of the pleadings to determine whether it has subject matter jurisdiction over the claims. Jerome Stevens Pharmacy, Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The plaintiff bears the responsibility of establishing the factual predicates of jurisdiction by a preponderance of evidence. Erby, 424 F. Supp. 2d at 182.

B. Dismissal Pursuant to Rule 12(b)(6) for Failure to State a Claim

In order to survive a Rule 12(b)(6) motion, the plaintiff must present factual allegations that are sufficiently detailed "to raise a right to relief above the speculative level." Bell Atl. Corp. v.

Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). As with facial challenges to subject-matter jurisdiction under Rule 12(b)(1), a district court is required to deem the factual allegations in the complaint as true and consider those allegations in the light most favorable to the non-moving party when evaluating a motion to dismiss under Rule 12(b)(6). Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006). As a general matter, the Court is not to consider matters outside the pleadings, per Rule 12(d), without converting defendant's motion to a motion for summary judgment.

C. Article III Standing

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" Valley Forge Christian Col. v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997) (citation omitted). A vital part of Article III's case or controversy limitation on the power of federal courts is the requirement that a plaintiff must have standing to invoke federal court jurisdiction. See Valley Forge, 454 U.S. at 475-76 ("Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."); Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974(11th Cir. 2005) ("Standing is a doctrine that stems directly from Article III's 'case or controversy' requirement") (internal quotation marks and citation omitted). "Standing . . . [is a] threshold jurisdictional question of whether a court may consider the merits of a dispute." Elend v. Basham, 471 F.3d 1199, 1204 (11th Cir. 2006).

A party seeking to invoke a federal court's jurisdiction bears the burden of establishing his standing to sue. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Bischoff v. Osceola

County, Fla., 222 F.3d 874, 878 (11th Cir. 2000). "To meet the requirements of Article III standing, a plaintiff must show: (1) that [he] has suffered an injury in fact, the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury." Nat'l Fed. of Indep. Builders v. Architectural & Trans. Barriers Compliance Bd., 461 F. Supp. 2d 19, 23 (D.D.C. 2006) (construing Lujan, 504 U.S. at 560-61); Center for Law and Education v. Dept. of Education, 396 F.3d 1152, 1157 (D.C. Cir. 2005). "The alleged injury in fact must be concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative." Id. (citing Lujan, 504 U.S. at 560-61; Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)). "The standing inquiry is particularly rigorous when a court is considering the asserted unconstitutionality of actions taken by another branch of the government." Id. (citing Raines v. Byrd, 521 U.S. 811, 819 (1997)). As the elements of standing are "'not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'" Palm v. Paige, 161 F. Supp. 2d 26, 29 (D.D.C. 2001) (quoting Lujan, 504 U.S. at 561)). If "'plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)).

IV. Plaintiff Lacks Standing to Bring His Claim Against the United States.

Plaintiff fails to meet two of the three requirements for Article III standing.

A. Plaintiff Lacks an Injury Sufficient to Establish Standing.

"An injury sufficient for standing purposes is 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or

hypothetical.'" Common Cause/Georgia v. Billups, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting Lujan, 504 U.S. at 560 (internal citations and quotation marks omitted)) (emphasis added). As the Eleventh Circuit has explained, "[n]o legally cognizable injury arises unless an interest is protected by statute or otherwise. . . . That interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Bochese, 405 F.3d at 980 (internal quotation marks and citations omitted). The complaint fails to articulate any harm to a concrete and particularized "legally protected interest" of Plaintiff's stemming from Rep.FL6's creation of legislative earmarks and his use of the MRA.

Similarly, in Palm, 161 F. Supp. 2d at 29, this Court dismissed a pro se plaintiff's complaint where the plaintiff lacked standing. In Palm, the plaintiff sought to challenge and invalidate several regulations promulgated by the Secretary of Education that affected the American Bar Association ("ABA") and modified a consent decree between the ABA and the U.S. Department of Justice. Id. at 28. The pro se plaintiff alleged that as a member of the ABA, he suffered an injury as a result of the regulations. Id. The Court stated that plaintiff's claims were too speculative and that he could not demonstrate an injury-in-fact as a result of the regulations under any of the three mandatory elements described in Lujan. Id. at 29. Thus, as the pro se plaintiff could not establish standing, the court dismissed the complaint with prejudice. Id. at 33.

Here, Plaintiff's argument is similar to those asserted in Palm, in that he complains that legislative earmarks and the MRA, which he alleges are used inappropriately by members of Congress, specifically Rep.FL6, puts Plaintiff at a disadvantage in his 2010 candidacy and would put him at a disadvantage in his prospective2012 candidacy for the U.S. House of Representatives. See Sec. Am. Compl. ¶¶ 11(b), 24-28, 42-45, 57. Plaintiff lacks constitutional standing to bring the

claims contained in the complaint as he has not alleged and cannot demonstrate that he has suffered an injury-in-fact, and Plaintiff's nebulous allegations of hypothetical injuries based upon statutory appropriations do not establish standing.

Plaintiff alleges that he has suffered from "the lack of availability of health insurance in Florida," because Plaintiff refused to pay "exorbitant and unaffordable prices for major medical" offered to his wife by Blue Cross Blue Shield of Florida, the only major medical coverage available to Plaintiff's wife. See Sec. Am. Compl. ¶ 93. Plaintiff further complains that he has suffered harm because he alleges the "Florida Health Political Action Committee (The PAC of Blue Cross Blue Shield of FL., Inc.)" has given Rep.FL6 $11,500 in emoluments over the past several years and if Plaintiff bought Blue Cross Blue Shield major medical coverage for his wife in 2010, part of his premium would have been used to provide emoluments to his opponent in the 2010 election. He further alleges that if Plaintiff buys the Blue Cross Blue shield coverage now, part of his premium will be used to provide Rep.FL6 emoluments in the 2012 election. See Sec. Am. Compl. ¶¶ 94-99.

Such allegations are not sufficient to establish standing. An Article III injury in fact must be "actual or imminent, not conjectural or hypothetical." See Lujan, 504 U.S. at 560; see also City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (explaining that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical"); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (holding that a litigant only has standing based on a threatened future injury if she can demonstrate that the injury "is credible and immediate, and not merely abstract or

speculative").[2]

Here, Plaintiff's complaint states that he does not have health insurance from Blue Cross Blue Shield of Florida, and does not intend to purchase said insurance because the premiums are too high. Further, Plaintiff alleges that he did not want part of his premiums to be allegedly used to provide Rep. FL 6 "emoluments" in 2010, and he does not want part of his premiums to be allegedly given to provide Rep. FL6 emoluments in 2012. See Sec. Am. Compl. ¶ 95. Plaintiff cannot establish injury based solely on evidence of the possibility that if Plaintiff had paid premiums to a specific insurance company, occurring at some time in the past and sometime in the future, that his premiums might partly be used as "emoluments" in 2010 and again in 2012. This combination of events is too attenuated and speculative to support standing for injunctive relief. See United Transp. Union v. Interstate Commerce Comm'n, 891 F.2d 908, 912 (D.C. Cir. 1989) ("[W]hen considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions[.]"). Indeed, the complaint contains no more than the bare and unsubstantiated allegations that Rep.FL6 allegedly uses legislative earmarks and his MRA in an inappropriate manner. See Sec. Am. Compl. generally.

In addition, Plaintiff has no legally protected interest (in statute or otherwise) in legislative

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[2] The exact standard for judging likelihood of future injury is unresolved in this Circuit. See Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268, 1274 (D.C. Cir. 1994) (noting that standard for future injury has been formulated as "likely," "fairly probable," and "certainly impending," among others) (citations omitted), see also Haase v. Sessions, 835 F.2d 902, 911 (D.C. Cir. 1987) ("real and immediate" or "realistic") (citations omitted). For the purposes of consistency, Defendant will use the term "likely" or "likelihood" here; however, this is not meant as an endorsement of one standard over another. As discussed throughout, Plaintiff cannot establish standing under any of the above formulations.

earmarks or a Members' Representational Allowance, or how they are appropriated. Rather, Plaintiff's alleged injuries are nothing more than generalized grievances with current government policy. See Warth v. Seldin, 422 U.S. 490, 499 (1975) (court's exercise of jurisdiction not warranted when "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens"). Plaintiffs' suit here is based on the mistaken notion that Plaintiff has a protected legal interest in Congressional legislative appropriations – and therefore he is harmed if they are not appropriated in his favor. Harm to such an interest is not "legally cognizable" and is insufficient for standing. Furthermore, Plaintiff's harm – that he is not receiving election assistance and Rep.FL6 is somehow benefitting politically from legislative earmarks and MRA – is "conjectural" and "hypothetical." Lujan, 504 U.S. at 560. Plaintiff's allegations amount to the possibility that Plaintiff might be suffering harm – based on his guess as to how legislative earmarks and MRA are used. Such a conjectural injury does not provide Plaintiff with standing to bring this suit before the federal courts.

B. Plaintiff Fails to Demonstrate That His Alleged Harm Was Caused by the United States.

Plaintiff's allegations also fail to demonstrate that the harm he alleges was caused by, or traceable to, the actions of the United States. Plaintiff's alleged injury, the lack of election assistance and the lack of health care assistance, is not "fairly traceable" to Defendant United States. The United States did not cause Plaintiff's health care concerns; the United States was not involved in the decision of certain Florida insurers not to insure Plaintiff's wife; the United States did not set Plaintiff's wife's insurance premiums or decide what procedures and medications would be covered by plaintiff's wife's policy. All of those matters depended on the "independent action of some third

party not before the court," Bischoff, 222 F.3d at 883 (quoting Lujan, 504 U.S. at 561), and thus are not fairly traceable to the United States.

Even if Plaintiff could establish an injury-in-fact, the complaint fails to demonstrate that his alleged injuries are fairly traceable to the actions of the United States.

Plaintiff's allegations do not demonstrate that Plaintiff: (1) has suffered an injury which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; and (2) there is a causal connection between the alleged injury and conduct that is fairly traceable to the defendant, and not the result of the independent action of some third party not before the court. Id. at 29 (citing Lujan, 504 U.S. at 560-61). Thus, the complaint should be dismissed with prejudice for lack of standing.

V. Plaintiff's Suit Is Barred By The Doctrine Of Sovereign Immunity.

As a sovereign, the United States, including its federal entities or agencies, enjoys immunity from suit except insofar as Congress has enacted legislation unequivocally waiving the government's sovereign immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994); United States v. Testan, 424 U.S. 392, 299 (1976). "'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'" Id. (quoting Meyer, 510 U.S. at 475); see also United States v. Nordic Village, 503 U.S. 30 (1992). Sovereign immunity bars all suits against the United States except in accordance with the explicit terms of statutory waiver of such immunity. Nordic Village, 503 U.S. at 33-34 ("[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'") (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976). A waiver of sovereign immunity must be clear and unequivocal and must be strictly

construed in favor of the sovereign. Ardestani v. INS, 502 U.S. 129, 137 (1991) (citing Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) and Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1986)); see also Department of the Army v. FLRA, 56 F.3d 273, 277 (D.C. Cir. 1995) ("the statutory waiver provision must unambiguously establish that it extends to the award of money damages"), rehearing denied; Haase v. Sessions, 893 F.2d 370, 373 (D.C. Cir. 1990) ("waivers of sovereign immunity, the Supreme Court has repeatedly reminded us, must be narrowly construed"). The construction of the statute favoring the sovereign must be followed as long as it is "plausible." Nordic Village, 503 U.S. at 37. Finally, a party bringing suit against the United States bears the burden to prove that the government has unequivocally waived its immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941); Interstate Bank Dallas, N.A., v. United States, 769 F.2d 299, 303 (5th Cir. 1985); Cominotto v. United States, 802 F.2d 1127, 1129 (9thCir. 1986); Cole v. United States, 657 F.2d 107, 109 (7th Cir. 1981).

In this case, there has been no waiver of sovereign immunity authorizing Plaintiff to sue the United States. Defendant also contend that sovereign immunity bars the instant action because Plaintiff has neither established that Rep.FL6 has taken actions outside its statutory powers nor established that he (Plaintiff) has any viable constitutional claim. See Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965) (recognizing the viability of the government's argument that sovereign immunity bars a claim where the "constitutional contentions are frivolous" and stating that the "doctrine whereby a court denies jurisdiction to entertain a suit upon the basis of a consideration of its merits seems to be an accepted feature of this field of law").

Because Plaintiff can point to no congressional statute waiving sovereign immunity and authorizing this suit against the United States, his complaint must be dismissed. See also Keener,

467 F.2d at 953 (suit for writ of mandamus to compel United States Congress to return to some uniform method of valuation for the United States currency was "frivolous" since, among other things, Congress was protected from suit by sovereign immunity).

VI. Members' Representational Allowance ("MRA") Does Not Violate Plaintiff's Fifth Amendment Due Process Rights or the Compensation Clause of Article I

Plaintiff alleges that 2 U.S.C. § 57b, the law providing for the Members' Representational Allowance ("MRA"), violates his Fifth Amendment Due Process rights and the Compensation Clause of Article I, § 6, cl. 1 because it provides incumbents with an unfair advantage during elections. See Sec. Am. Compl. at 2, 54-55. Plaintiff seeks an order of this court declaring 2 U.S.C. § 57b unconstitutional in violation of the Fifth Amendment Due Process Clause and the Compensation Clause. Id. at 65. Plaintiff also seeks an advisory opinion that any new MRA that fails to provide transparency and specific criminal penalties is unconstitutional. Id.

Specifically, Plaintiff alleges the MRA violates his Due Process rights because it "enable[s] incumbent members of Congress to gain an unfair election advantage over challengers," id. at 6, ¶17 & ¶38, that is not "reasonably related to any governmental purpose." id. at 8, ¶ 40. Plaintiff further alleges that MRA funds violate the Compensation Clause. See id. at 34, 65. As the MRA is provided by law to Members of Congress only to support their official and representational duties, Plaintiff's claims fail as a matter of fact and law.

A. Background on MRA

Congress provides funding for the Members' Representational Allowance in its annual Legislative Branch Appropriations Act. See e.g. U.S. Congress, House Committee on Appropriations, Legislative Branch Appropriations Bill, 1996, report to accompany H.R. 1854, 104th

Cong., 1st sess., H.Rept. 104-141 (Washington: GPO, 1995). Subsequent legislation further defined the MRA and made it subject to regulations and adjustments adopted by the Committee on House Administration. P.L. 104-186, 110 Stat. 1719 (Aug. 20, 1996); 2 U.S.C. §57b.

While Representatives have a high degree of flexibility to operate their offices in a way that supports their congressional duties and responsibilities, they must operate within a number of restrictions and regulations. The Members of Congress may only spend their MRA to support their official and representational duties. See Members' Congressional Handbook, available at http://cha.house.gove/PDFs/MembersHandbook.pdf. According to these regulations, the MRA may not be used for personal, campaign, or political expenses. Id. Only expenses the primary purpose of which are official and representational and which are incurred in accordance with the Members' Congressional Handbook are reimbursable. Id. Additional regulations or restrictions regarding reimbursable expenses may be promulgated by the Committee on House Administration, the Commission on Congressional Mailing Standards (also known as the Franking Commission), and the Ethics Committee, and may be found in a wide variety of sources, including statute, House Rules, committee resolution, the Members' Congressional Handbook, the Franking Manual, and the House Ethics Manual. See generally IDA A. BRUDNICK, CONG. RESEARCH SERV., R40962, MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE (Jan. 5, 2011); see also IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30064, CONGRESSIONAL SALARIES AND ALLOWANCES (Jan. 4, 2011); House Rule XXIV "Limitations on use of official and unofficial accounts."

B. Fifth Amendment

In order for Plaintiff to demonstrate that the MRA statute violates his Due Process rights under the Fifth Amendment, plaintiff must show the Legislative Appropriations Act and 2 U.S.C.

§57b have no rational legislative purpose. See Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way"). Plaintiff has failed to do so in this case.

Congress was neither arbitrary nor irrational when it appropriated funds for Members to conduct their official and representational duties. These funds are essential for the legislative branch to carry out its Article I duties and responsibilities. Congress has authorized the MRA to be used to pay for such official and representational expenses as personnel compensation, rent, communications, utilities, printing and reproduction, and travel. See BRUDNICK, MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE at 9-10. With respect to the personnel compensation for aides, the Supreme Court noted almost 40 years ago, "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants." Gravel v. United States, 408 U.S. 606, 616 (1972). As the Legislative Branch Appropriations Acts have a rational legislative purpose—that is to enable Congress to perform its Article I duties and responsibilities—it is neither arbitrary nor irrational for Congress to appropriate funds in order to do to so. In sum, this Court should conclude that the Plaintiff has failed to demonstrate that the MRA statute violates his Due Process rights under the Fifth Amendment.

C. Compensation/Ascertainment Clause.

Plaintiff further alleges that because Members benefit from privileges funded by the MRA,

these benefits act as compensation that has not been ascertained by law. See Sec. Am. Compl., at 50-51, ¶ 209(h)-(k). Here, Plaintiff's argument fails because the MRA is not compensation. Moreover, even if it were compensation, the MRA is provided for by law; thus, it does not violate the Ascertainment Clause.

1. Background on the Compensation/Ascertainment Clause.

What Plaintiff calls the "Compensation Clause," which courts refer to as the "Ascertainment Clause," requires that Senators and Representatives receive compensation for their services as ascertained by law and paid out of the Treasury. See also U.S. CONST. Art. 1, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."). The "animating purpose of the Ascertainment Clause is to affix political responsibility for the level of Members' pay ultimately with Congress itself." See Humphrey v. Baker, 848 F.2d 211, 215 (D.C. Cir. 1988). If "Congress acted irresponsibly in setting salaries, members would be held responsible by the voters." See Pressler v. Simon, 428 F. Supp. 302, 306 (D.D.C. 1976), *vacated and remanded on other grounds*, 431 U.S. 169 (1977). The D.C. Circuit has held that Congress does not have to set specific numbers for Member salaries, but it is enough to specify an index or formula. See Boehner v. Anderson, 30 F.3d 156, 162 (D.C. Cir. 1994) (holding that the COLA law was not a separate law enacted each year that would violate the 27th Amendment); Shaffer v. Clinton, 54 F. Supp. 2d 1040 (D. Colo. 1999) (same).

2. Member's Compensation is Determined by Statute.

Prior to 1967, congressional salaries were set "directly by Congress, in specific legislation setting specific rates of pay." Humphrey v. Baker, 848 F.2d 211, 212 (D.C. Cir.); see also Pressler

v. Simon, 428 F. Supp. 302, 303 (D.D.C. 1976), aff'd sub nom. Pressler v. Blumenthal, 434 U.S. 1028 (1978). In 1967, Congress changed course. The Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 225, 81 Stat. 613, 642-45 (1967) ("Salary Act"), authorized a commission – the Commission on Executive, Legislative, and Judicial Salaries – to review congressional (and certain other) salaries once every four years and report to the President. The Salary Act required the President, in turn, to include in his next budget transmission to Congress his recommendations for congressional rates of pay. Those rates of pay would become effective unless Congress disapproved within 30 days.[3]

In 1989, Congress passed the Ethics Reform Act, which was "a comprehensive piece of legislation which linked pay provisions to substantive changes in the ethical rules governing Members of Congress, Executive and Judicial Branch officials." Boehner, 809 F. Supp. at 141. See also Pub. L. No. 101-194, §§ 703(2)(A), 804, 1101(b), 103 Stat. at 1768, 1776-78, 1782; Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, § 6(b), 105 Stat 447, 450 (1991) (amending Ethics Reform Act to remove exception for Senators). The Act required that any future pay increases be enacted into law by Congress and the President; and provided that no quadrennial salary increase would take effect until an intervening election had occurred. Pub. L. No. 101-194, § 701, 103 Stat. at 1763-67.

3. The MRA is not Compensation

Unlike compensation, which is described above, and which Members may spend as they

[3] The Salary Act initially permitted one house of Congress to disapprove of the President's recommendation. See Humphrey, 848 F.2d at 215. After INS v. Chadha, 462 U.S. 919 (1983), was decided, Congress amended the Salary Act to require disapproval of the President's recommendations by joint resolution of both houses of Congress. See Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, § 135(e), 99 Stat. 1185, 1322 (1985).

choose, the MRA may only be used to reimburse official and representational expenses incurred by Members in their official capacity. A Members' Representational Allowance is not transferable between years, and unspent funds from one year cannot be obligated in any subsequent year. See Brudnick, MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE, at 8. Moreover, Legislative Branch Appropriations Acts generally have contained language requiring the amount remaining in the MRA at the end of the year to "be used for deficit reduction or to reduce the federal deficit." See Brudnick, MEMBERS' REPRESENTATIONAL ALLOWANCE: HISTORY AND USAGE, at n. 15 (citing P.L. 104-53, P.L. 104-197, P.L. 105-55, P.L. 105-275, P.L. 106-57, P.L. 106-554, P.L. 107-68, P.L. 108-83, P.L. 108-447, P.L. 109-55, P.L. 110-161, P.L. 111-8, and P.L. 111-68).

4. The MRA is Ascertained by Law.

Even if this court were to conclude that the MRA is "compensation," which it is not, the MRA would still not violate the Compensation Clause because the MRA is "ascertained by law." As discussed above, legislative appropriations to the MRA and 2 U.S.C. § 57(b), which allows the MRA to be used, are laws that provide for federal funds to support conduct of official and representational duties. As the purpose of the Ascertainment Clause was to ensure that Members of Congress were politically responsible for the appropriation of Congressional salary, Humphrey, 848 F.2d at 215, the MRA does not violate this Clause because it is provided for in politically transparent statutes and regulations.

VII. Plaintiff's Claim Is Barred By The Political Question Doctrine.

To the extent that Plaintiff challenges the procedures by which Congress appropriates money, his complaint is non justiciable under the political question doctrine. Three inquiries dictate whether a controversy is non justiciable, i.e., involves a political question: (1) whether the issue

involves resolution of questions committed by the text of the Constitution to a coordinate branch of government; (2) whether resolution of the question would demand that the court move beyond areas of judicial expertise; and (3) whether prudential considerations counsel against judicial intervention. Made In The USA Foundation v. United States, 242F.3d 1300, 1311 (11th Cir. 2001); see Nixon v. United States, 506 U.S. 224, 228 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

Legislative power is granted by the Constitution to Congress. See U.S. Const., art. I, § 1. Resolution of the Plaintiff's claim challenging congressional earmarks would constitute an unwarranted judicial interference in the legislative branch's sphere of government. See, e.g., Nixon, 506 U.S. 224 (1993) (holding nonjusticiable challenge to procedures by which Senate tries impeachments); Keener, 467 F.2d at 953 ("no cause of action lies to compel Congress to exercise its discretion to legislate on a purely political question").

Even if it could be said that Congress in its use of earmarks has chosen an unwise means of implementing its legislative power, the Appropriations Clause does not provide an identifiable textual limit on Congress' authority in this regard. See Made In The USA Foundation, 242 F.3d at 1315 (the Treaty Clause "fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements").

Plaintiff asserts that congressional designation of earmarks is unconstitutional, (see Sec. Am. Compl. ¶¶ 5, 5.1, 5.2, generally), but nowhere other than his conclusory assertions in his complaint does he explain why. Further, it has long been the rule, Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), that once a bill has passed both Houses of Congress and been signed by the President, courts will not "look beyond the authenticated enrolled bill for evidence questioning the legality of the process by which the law was enacted." See, e.g., One SimpleLoan v. U.S. Secretary of Education,

496 F.3d 197, 203 (2d Cir. 2007) (reaffirming rule announced in Marshall Field and dismissing Appropriations Clause claim that provision in enacted laws was not subject to approval by House and Senate).

Finally, a review by the court of the process by which Congress legislates "would run the risk of intruding upon the respect due coordinate branches of government." Made In The USA Foundation, 242 F.3d at 1318; see Goldwater v. Carter, 444 U.S. 996 (1979) ("Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.") (Powell, J., concurring). The "apparent acquiescence" of the executive branch in the practice of congressional earmarks "further counsels against judicial intervention in the present case." Made In The USA Foundation, 242 F.3d at 1319.

VIII. Plaintiff's Claim Fails On The Merits.

"That Congress has wide discretion in the matter prescribing details of expenditures for which it appropriates must, of course, be plain." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-22 (1937) . That discretion is not limited when the "prescribing details" are contained within a committee report accompanying a law, as opposed to the text of a law itself. All earmarks - whether contained in statutes or committee reports - are funded by appropriations contained in laws that were approved by both Houses of Congress and signed by the President. Those laws are the legal basis for which those funds are appropriated, were passed in full accordance with the Appropriations Clause of the Constitution.

WHEREFORE, Defendant, the United States respectfully requests that the Court dismiss Plaintiff's claims against it with prejudice.

Date: March 15, 2011

Respectfully submitted,

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