

U.S. DISTRICT COURT  
DISTRICT OF NH  
**THE UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEW HAMPSHIRE**  
2008 MAY 19 A 9:24

**Fred Hollander,**  
*Plaintiff,*

v.

**Senator John McCain**  
&  
**Republican National Committee**  
*Defendants.*

**Civil Action No. 1:08-cv-99-JL**

**Plaintiff's Opposition To The**  
**Motion Of Defendants Senator John McCain And The Republican National Committee**  
**To Dismiss The First Amended Complaint**

NOW COMES the plaintiff, Fred Hollander, and hereby submits his Opposition To The Motion Of Defendants To Dismiss The First Amended Complaint, and in support thereof would respectively show the court as follows:

**I. Background**

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 to remedy his disenfranchisement in the New Hampshire Republican primary and consequently in the national selection of the Republican candidate for the Office of President. Defendants have disenfranchised plaintiff by selecting a candidate for the 2008 election to the Office of President who is not eligible to that office. In doing so, plaintiff's vote, as were the votes of all others who voted for eligible candidates, was effectively not counted.

McCain, having won many Republican Party primary elections and caucuses, has been allocated a majority of delegates who are pledged to nominate him as the Republican Party candidate for the 2008 election to the Office of President. McCain reached the status of presumptive nominee through his participation in state primary elections, including the New Hampshire state primary election held on January 8, 2008. The RNC relies on these state primary elections to select the nominee for its candidate to run in the general presidential election.

McCain is not a natural born citizen and therefore not eligible to the Office of President as prescribed by Article II, Section 1 of the United States Constitution. McCain's birth occurred outside of the United States and its territories, and therefore he is not a "natural born Citizen" in the context of the Fourteenth Amendment. Plaintiff has not witnessed records of McCain's exact birth location, but by his own admission, McCain was born in the Panama Canal Zone. Since the hospital at the Coco Solo Naval Air Station did not even exist until 1941, five years after his birth, it is reasonable to assume that he was born in the city of Colón in the Republic of Panama. Even if he had been born on the premises of the Coco Solo Naval Air Station he would still not be a natural born citizen since by no authority was the Coco Solo Naval Air Station within the United States jurisdiction at the time of his birth in 1936.

The United States never intended, and certainly never declared, the Canal Zone as a U.S. territory. The Hay-Bunau-Varilla Treaty,<sup>1</sup> ratified by the U.S. Senate on February 23, 1904 and by President Theodore Roosevelt on February 25, 1904, maintained the Canal Zone as sovereign to the Republic of Panama. The United States Supreme Court concurred that the United States did not have sovereignty over the Canal Zone.<sup>2</sup> *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948) The Supreme Court again referenced *Vermilya-Brown* when it found that no transfer of sovereignty occurred with respect to military bases on land leased by a foreign country.<sup>3</sup> *United States v. Spelar*, 338 U.S. 217 (1949)

Federal statute 8 U.S.C. 1403(a)<sup>4</sup> "declares" McCain a citizen due that his birth in the Canal Zone does not qualify him as a natural born citizen. In 1795, with the enactment of 1 Stat. 414,<sup>5</sup> Congress rescinded the granting of "natural" citizenship to those born outside the United States

---

<sup>1</sup> Hay-Bunau-Varilla Treaty, Article III The Republic of Panama grants to the United States all the rights, power and authority within the zone mention and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

<sup>2</sup> Vermilya-Brown Co. v. Connell So the Administrator of the Wage-Hour Division has issued a statement of general policy or interpretation that directs all officers and agencies of his division to apply this Act to the Canal Zone, admittedly territory over which we do not have sovereignty.

<sup>3</sup> United States v. Spelar To the extent that *Vermilya-Brown Co., Inc., v. Connell* has any application to the case at bar, it stands as authority for our result here, for it postulates that the executive agreement and leases effected no transfer of sovereignty [338 U.S. 217, 222] with respect to the military bases concerned.

<sup>4</sup> 8 U.S.C. 1403(a) Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.

<sup>5</sup> 1 Stat. 414 Chapter 20, Section 1 ¶ 4 ...and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States...

jurisdiction, as it had been allowed in 1 Stat. 103,<sup>6</sup> which had been enacted just five years earlier in 1790.

The Fourteenth Amendment only provides two methods of citizenship: (1) born in the United States; or (2) naturalized in the United States. Since Senator John McCain was not born in the United States, or even any land within U.S. jurisdiction, he must have been naturalized. The Supreme Court has recognized the difference between a “native born” citizen and a “naturalized” citizen in the matter of eligibility to be President.<sup>7</sup> *Schneider v. Rusk*, 377 U.S. 163 (1964)

McCain was naturalized some time after his birth and a Certificate of Declared Citizenship would have been required for the issuance of his United States passport. Plaintiff contends that McCain’s Certificate of Birth and Certificate of Declared Citizenship, which were subpoenaed at the United States Citizenship And Immigration Service, would corroborate his claim that McCain is a naturalized citizen.

Since McCain is not eligible to the Office of President, both defendants have disenfranchised plaintiff by not counting his vote in the New Hampshire primary and subsequently in the national selection of the Republican presidential candidate. Plaintiff seeks the remedy of having his vote counted among only candidates who are eligible to the Office of President.

## **II. Plaintiff’s Claims Are Not Moot And Are Ripe For Adjudication**

Plaintiff was injured by his disenfranchisement in the New Hampshire primary election. This is more serious than simple vote dilution. The RNC listed McCain as a candidate in the primary election even though McCain is not eligible to the Office of President. Since the RNC counted votes cast for an ineligible candidate, and those votes outnumbered the votes cast for eligible candidates, the RNC consequently completely disenfranchised plaintiff as well as every other voter who voted for eligible candidates.

This matter is ripe for adjudication, because defendants have injured the plaintiff and a remedy is available. Defendants disenfranchised plaintiff by not counting his vote in the New Hampshire primary election and by the subsequent conferring upon McCain by the RNC the

---

<sup>6</sup> 1 Stat. 103 And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens...

<sup>7</sup> Schneider v. Rusk We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity, and are coextensive. The only difference drawn by the Constitution is that only the “natural born” citizen is eligible to be President. Art. II, § 1. [p166]

status of presumptive presidential nominee of the Republican Party. Defendants cannot reasonably argue that McCain is not yet the official nominee, because: (1) McCain has acquired the delegates required to elect him as the official nominee; (2) McCain has been receiving protection from the US Secret Service due to his status as the presumptive nominee; and (3) for all intents and purposes the RNC has continued to imply, and allowed others to infer, that McCain will be the official nominee.

This matter is not moot, because it is possible to grant effective relief on these claims. Although the New Hampshire primary has already taken place, the votes in that primary and other state primaries, can still be reallocated to candidates who are eligible to the Office of President. While McCain is the presumptive nominee as a result of voter disenfranchisement, another candidate can still be nominated by counting only the votes that were cast for eligible candidates. By removing McCain as a candidate and counting the votes cast for eligible candidates, the RNC can select an eligible candidate to represent the Republican Party in the general election.

The matter of eligibility to the Office of President due to citizenship status of a candidate has never been resolved by the courts and postponing resolution until after the general election could be disastrous. There are two earlier milestones that present potential remedies that would not pose serious consequences: (1) a resolution prior to the national convention of the RNC would allow the RNC to select an eligible candidate independently from the guidance of the Court thereby ensuring the public would have faith in the new selection; and (2) a resolution after the national convention, yet prior to the general election would also allow the RNC to independently select a new candidate, although the RNC would not have the benefit of having the delegates gathered at the national convention and the new candidate may be disadvantaged depending on the remaining time before the general election. However, postponing this action until after the general election, as the defendants seem to suggest, would leave the RNC powerless to select a replacement. At that time intervention by the Court would have more serious consequences than it would prior to the general election. It would even be a conflict of terms for the Court to select, or even impact the selection of, a new President elect and it would likely shatter the public's faith in our electoral process. It is disingenuous for the defendants to suggest postponing a resolution of this matter until that time, because they know that at that time, the Court may be less willing to step in to resolve this critical issue.

### III. Defendants Are State Actors Who Have Violated Plaintiff's Rights

Both defendants are state actors because each defendant “has acted together with or has obtained significant aid from state officials.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) Both defendants have accepted aid from the State of New Hampshire and have acted with state officials in the execution of the New Hampshire primary election. The State of New Hampshire funded the New Hampshire Republican primary election. The primary election was managed and executed by state officials, including New Hampshire’s Secretary of State. The RNC accepted this aid and support of the State of New Hampshire. McCain indirectly accepted the aid and support of the State of New Hampshire by participating in this primary election. McCain directly sought the aid of the State of New Hampshire when he applied for candidacy in the New Hampshire primary and when he swore to the New Hampshire Secretary of State that he is eligible to the Office of President. McCain has also accepted aid from the United States in the form of campaign finance assistance and protection from the United States Secret Service due to his status as the presumptive nominee. The RNC and McCain similarly acted with and have obtained significant aid from other state officials in other state primaries.

Defendants argue that “it is well-established that candidates for political office, like Senator McCain are not state actors” citing *Federer v. Gephardt*, 363 F.3d 754 (8<sup>th</sup> Cir. 2004), yet this position is not found in *Federer v. Gephardt*. The court simply found “a defendant’s government employment does not make the defendant a governmental actor for all purposes.” The court found that the defendants were not state actors, but not at all due to political candidacy. The court ruled that even though defendants were federal employees, they were not state actors, because the alleged actions “were not ‘caused by the exercise of some right or privilege created by’ their federal employment.”

Defendants also argue that it is “well-established that political parties are not state actors” citing *O’Brien v. Brown*, 409 U.S. 1, 4-5 (1972), yet again this position is not found in *O’Brien v. Brown*. Defendants have significantly mischaracterized the Supreme Court in *O’Brien v. Brown* where it had actually stated, “we entertain grave doubts as to the action taken by the Court of Appeals” with no opinion at all regarding whether a political party could be considered a state actor.<sup>8</sup> The Appeals Court simply stated, “We have no difficulty concluding that

---

<sup>8</sup> Defendants attribute the Supreme Court as “expressing ‘grave doubts’ that a political party could be considered a state actor” in *O’Brien v. Brown*, 409 U.S. 1, 4-5 (1972)

defendants' action against these delegates was state action" and the Supreme Court never specifically ruled whether there was a state action. On the contrary, the Supreme Court has specifically ruled that the "selection of party nominees ... makes the party ... an agency of the state."<sup>9</sup> *Smith v. Allwright*, 321 U.S. 649, 664 (1944)

In fact, defendants have not cited any prior case law that would exempt them from their status as state actors in this particular matter. While the defendants note that the Supreme Court has held that political parties and their members "enjoy a constitutionally protected right of political association" *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) and that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party" *Democratic Party v. Wisconsin*, 450 U.S. 107, 123-24 (1981), these rulings were made in the context of violations of rules of the Democratic Party, not violations of Constitutional requirements for eligibility of elected office.

Because both defendants are state actors: (1) they are prohibited from, and accountable for, violating plaintiff's rights under 42 U.S.C. § 1983; and (2) they may not claim immunity for their actions as protected speech under the First Amendment.

#### **IV. Plaintiff Has Standing To Bring This Action**

At an "irreducible constitutional minimum," a plaintiff must establish three elements to have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must show that he has suffered "an injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* "Second, there must be a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* At 561.

Plaintiff has suffered an injury in fact that is actual or imminent, not conjectural or hypothetical. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 to remedy his disenfranchisement in the New Hampshire Republican primary and consequently in the national selection of the Republican presidential candidate. Plaintiff's actual injury is the loss of his vote in the primary election, both state and national, for the selection of the Republican presidential candidate.

---

<sup>9</sup> *Smith v. Allwright* We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.

Defendants' complained-of conduct caused plaintiff's injury. McCain participated in the New Hampshire Republican primary under false pretenses. He swore to the New Hampshire Secretary of State that he is eligible to the Office of President even though he is not a "natural born Citizen" as required by Article II, Section 1 of the United States Constitution. The RNC authorized McCain's participation in the Republican primary elections, in New Hampshire and in most other states. The RNC counted votes cast for McCain, and those votes outnumbered those cast for any eligible candidate, thereby rendering plaintiff's vote and all other votes for eligible candidates ineffective. It was the disenfranchisement of those who voted for eligible candidates, including the plaintiff, which led to McCain's success, and the demise of eligible candidates, in New Hampshire and subsequent state primaries.

It is likely that the injury will be redressed by a favorable decision. Plaintiff seeks the following relief:

- A. Declare Senator John McCain ineligible to the Office of President;
- B. Order Senator John McCain to withdraw his candidacy for this nomination; and
- C. Order the Republican National Committee to: (1) reassign any and all delegates currently assigned to Senator John McCain to other candidates who are eligible to the Office of President; and (2) nominate a candidate who is eligible to the Office of President.

The above actions would replace the ineligible candidate with a candidate who is eligible to the Office of President. Plaintiff's vote for an eligible candidate would then be counted by the RNC in a manner consistent with their rules for the nomination of the Republican presidential candidate. Should the above remedies be enacted prior to the RNC's national convention, the RNC would be able to choose a new, eligible candidate without the need for the Court to intervene in the selection. This is the most desirable remedy.

Plaintiff's injury is certainly concrete. His disenfranchisement is not abstract, nor is the consequent selection of a Republican presidential candidate who is not eligible to the Office of President. Further consequences, including the imminent loss of his vote in the general election and the constitutional crisis that could materialize should McCain win the general election, also support plaintiff's argument that his injury is concrete. Plaintiff's injury is also particularized, especially given the context of the meaning of "particularized" in Footnote 1 of *Lujan v. Defenders of Wildlife*, "By particularized, we mean that the injury must affect the plaintiff in a

personal and individual way.” The Supreme Court does not require that the injury affect the plaintiff in any amount or manner relative to others. In this case, the loss of a vote certainly affects the plaintiff in a “personal and individual way” and plaintiff’s injury is not at all diminished by the lost votes of others. The protection of *each* person’s right to vote is essential in maintaining the public’s faith in our electoral process. By defendants’ arguments, an individual’s right to vote is insignificant compared to the general voting public. And by extension, defendants’ argument would lead to the contention that the votes of small groups, or even perhaps entire minorities, are insignificant compared to the general voting public. There is good reason why the defendants’ position is not supported by the Constitution, federal statute or prior case law.

Neither is defendant’s reference to *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) applicable here, because while they lacked standing at least in part because the “plaintiffs [had] conspicuously fail[ed] to demonstrate they, as opposed to the general voting population, will feel its effects,” in this matter, the plaintiff has met this requirement of *Lujan v. Defenders of Wildlife* by stating how his injury affected him in a “personal and individual way.”

Although plaintiff has already established standing based on the elements in *Lujan* for his actual injury, plaintiff also faces two serious imminent injuries. Plaintiff would again be disenfranchised should he vote for McCain in the general election and then McCain should be subsequently removed due to his lack of eligibility. Plaintiff would also be injured by the Constitutional violation should McCain be inaugurated as our nation’s next President. All citizens have standing to challenge the constitutionality of state action when they are threatened with injury as a result of the action. *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)

The Supreme Court has also made it clear that a person may have standing no matter how small their stake in the outcome of a litigation. *United States v. Scrap*, 412 U.S. 669 (1973) Footnote 14, “‘Injury in fact’ reflects the statutory requirement that a person be ‘adversely affected’ or ‘aggrieved,’ and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more than a stake in the outcome of an action than a fraction of a vote, see *Baker v. Carr*, 369 U.S. 186;” In this matter, plaintiff has far more than a mere interest, he has a direct stake in the outcome: the reinstatement

of his vote in the primary election and the avoidance of his imminent disenfranchisement in the general election. So while in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court held that “standing to sue may not be predicated upon an interest... which is held in common by all members of the public”, this matter is dissimilar since plaintiff has established a direct stake in the outcome.

#### **V. The Eligibility of a Candidate is Not a Nonjusticiable Political Question**

Defendants allege that the subject matter of this action is nonjusticiable under the Political Question Doctrine. It is the defendants’ burden to show that the political question constitutionally committed to a coordinate political department is “inextricable from the case.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). Defendants argue that issues relating to a candidate’s eligibility to the Office of President rest solely with the Electoral College and then with the Congress. The question of whether Congress and the Electoral College have exclusive authority to evaluate a candidate’s eligibility to the Office of President is easily extracted, because the plaintiff never injected it. Plaintiff brings this action to remedy the selection by the RNC of an ineligible candidate *before* the issue comes before the Electoral College or Congress.

Even should this matter still be an issue after the general election, defendants are mistaken regarding the authority of Congress and the Electoral College and how their authority may limit the jurisdiction of this Court. While the defendants are correct that Article II, Section 1 of the Constitution empowers the Electoral College with the election of the President, also by Article II, Section 1, the Constitution limits the authority of the electors to only electing a person who meets the eligibility requirements, including: “natural born Citizen”, “Age of thirty five Years” and “fourteen Years a Resident within the United States.” The authority granted by the Constitution for the Electoral College to elect the President does not preclude the Court’s authority to rule on a candidate’s eligibility, especially prior to the general election. Certainly a judgment by the Court now would not interfere at all with the Electoral College’s constitutional authority to elect the President, since the election is not yet before the Electoral College.

Defendants are misstating the ramifications of the separation of powers. The separation of powers is essential as a check on each other branch and that is precisely why Article III of the Constitution has granted the Court jurisdiction to interpret the meaning of “natural born Citizen” as it applies to the eligibility of the Office of President.

Defendants argue that further review of a presidential candidate's eligibility rests with Congress by citing S. Res. 511, 110<sup>th</sup> Cong. (2008), which is a non-binding resolution that purportedly resolves<sup>10</sup> McCain to be a "natural born Citizen." Even though Democratic presidential candidates Senator Hillary Clinton and Senator Barack Obama introduced this resolution, it is totally meaningless in the context of plaintiff's claim. The United States Senate can no more resolve that Senator John McCain is a "natural born Citizen" than it can resolve that Governor Arnold Schwarzenegger is a "natural born Citizen." The only manner in which "natural born Citizen" can be redefined to apply to McCain would be by a Constitutional Amendment.

#### **VI. Plaintiff Has Stated a Claim for Which Relief Can be Granted**

When considering a Motion to Dismiss for failure to state a claim, the Court must accept as true all well-pleaded allegations in the Complaint, and view them in the light most favorable to the plaintiffs. *Malina v. Gonzales*, 994 F.2d 1121, 1125 (5<sup>th</sup> Cir. 1993). Such motions should be granted only when it appears without a doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5<sup>th</sup> Cir. 1994).

Plaintiff has properly and thoroughly alleged his claim of disenfranchisement by the defendants: (1) by McCain for entering the New Hampshire Republican primary even though he is not, nor was not, eligible to the office for which he ran; and (2) by the RNC for counting votes cast for an ineligible candidate which, since those votes outnumbered the votes cast for eligible candidates, effectively ignored the votes cast for eligible candidates.

There is a simple remedy at this time that would correct the disenfranchisement of the plaintiff. Should this Court order that McCain withdraw his candidacy and/or that the RNC choose a candidate other than McCain who is eligible to the Office of President, then plaintiff's vote would be counted in a contest among candidates who are eligible to the Office of President. The RNC would then be in a position of selecting a new candidate based on the votes cast for eligible candidates. At this point in time simply removing McCain from the New Hampshire primary would not provide relief since: (1) the subsequent state primary elections were affected by the results of the New Hampshire primary; and (2) the results of the subsequent state primary

---

<sup>10</sup> S. Res. 511, 110<sup>th</sup> Cong. (2008) Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

elections are now known and McCain would still be the Republican nominee even without the delegates awarded based on the New Hampshire primary.

**VII. Conclusion**

WHEREFORE, in light of all of the above-stated reasons, plaintiff prays this Honorable Court DENY the Defendants' Motion To Dismiss Plaintiff's First Amended Complaint and to grant plaintiff such other and further relief to which he may be justly entitled.

Respectfully submitted,

*Date: May 17, 2008*



\_\_\_\_\_  
Fred Hollander, Pro Se  
P.O. Box 6161  
Nashua, NH 03063-6161  
(603) 882-5565

**Certificate of Service**

I hereby certify that a copy of the foregoing pleading was served on the defendant pursuant to Fed.R.Civ.P 5 (b)(2)(E) by e-mailing the pleading to mail@nhlawoffice.com.



\_\_\_\_\_  
Fred Hollander, Pro Se