THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Fred Hollander,
Plaintiff,

v.

Senator John McCain
&
Republican National Committee
Defendants.

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

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

Plaintiff respectfully submits this Sur-Reply in order to address new arguments presented in defendants' Reply and to submit Senator John McCain's ("McCain") birth certificate in support of plaintiff's claim that McCain is not a natural born citizen of the United States.

I. Plaintiff Was Disenfranchised Due To McCain's Ineligibility

Although local election officials may have "counted" plaintiff's vote, plaintiff's argument is, and has been, that since more votes were counted towards an ineligible candidate, plaintiff's vote was not effectively counted in the New Hampshire state primary.

Plaintiff has also argued that simply removing McCain from the New Hampshire primary at this time 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 elections are now known and McCain would still be the Republican nominee even without the delegates awarded based on the New Hampshire primary. Removing McCain from the New Hampshire primary without further relief would be equivalent to rerunning the beginning of a race without the disqualified runner while maintaining the disqualified runner as the winner.

II. Children Born Outside The United States Can Only Be Naturalized Citizens

Contrary to defendants' arguments, even children of United States citizens, if born outside of the United States, can only become naturalized citizens. They may even be citizens ***at*** birth due to naturalization, but that is still distinguishable from citizenship ***by*** birth as defined in the Constitution. The Supreme Court has already ruled very clearly on this issue, "citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States,

and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization." *United States v. Wong Kim Ark* 169 U.S. 649, 702 (1898). "The Fourteenth Amendment, ... leaves power where it was before, in Congress, to regulate naturalization" *Id. at 703* Since McCain is a citizen by act of Congress, he is therefore a naturalized citizen, not a natural born citizen.

The defendants are absolutely incorrect in their assertion regarding the effect of the Fourteenth Amendment on Congress' authority to define "natural born Citizen" or to determine which among persons born outside the United States are citizens by birth. The only time that Congress had that authority and chose to exercise that authority was in 1790 with the enactment 1 Stat. 103,[1] yet soon thereafter Congress deliberately acted to rescind the granting of "natural born" citizenship in 1795 with the enactment of 1 Stat. 414.[2] Since its ratification in 1898, the Fourteenth Amendment[3] has removed Congress' authority to define "natural born Citizen." The Fourteenth Amendment "contemplates two sources of citizenship, and two only: birth and naturalization." *United States v. Wong Kim Ark* 169 U.S. 649, 702 (1898). Congress' authority lies exclusively with respect to naturalization. No act of Congress, not even the Senate resolution[4] referenced in defendants' Motion To Dismiss, can alter the Constitution's definition of "natural born Citizen." Only an amendment to the Constitution could alter the definition of "natural born Citizen."

III. McCain Is Not A Natural Born Citizen

The Constitution does not grant citizenship to persons born to United States citizens. That power lies exclusively with Congress. The Constitution only grants citizenship to persons "born in the United States, and subject to the jurisdiction thereof." McCain is a citizen by law, and even if he was a citizen ***at*** birth by law, he was still not a citizen ***by*** birth as defined by the Constitution. McCain was not born in the United States. Even if McCain had been born in the Canal Zone, it was not sovereign to the United States. Even the passage of the Hay-Bunau-Varilla treaty as quoted in defendants' Reply, "grants to the United States all the rights, power and authority within the zone . . . which the United States would possess ***if*** it were sovereign," (emphasis added) demonstrates that the Canal Zone was not sovereign to the United States, only that the United States would have the same rights, power and authority ***if it were sovereign***.

IV. Plaintiff Has Established Standing

Plaintiff, in his Reply, has already established that his situation is dissimilar to *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000), because while they lacked standing at least in part because the "plaintiffs

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[1] 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...

[2] 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...

[3] Fourteenth Amendment, Section 1 All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

[4] S. Res. 511, 110th 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.

[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,* 504 U.S. 555, 560 (1992) by stating how his injury affected him 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.

"To deny standing to persons who are in fact, injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." *United States v. SCRAP*, 412 U.S. 669, 688 (1973).

V. Plaintiff's Claims Are Ripe For Adjudication

It is disingenuous for the defendants to argue that this matter is not ripe on the basis that McCain is not yet the official nominee. McCain, for all intents and purposes, including this matter, is the official nominee. No other candidate has demonstrated any real contention for the nomination. McCain's nomination at the national convention is at this point simply a formality. It is hardly speculative.

This Court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Withholding adjudication until after McCain's official nomination would present plaintiff with the ongoing hardship of establishing grounds for adjudication at each subsequent stage of the election process: prior to the general election, prior to the vote of the Electoral College, prior to the Senate's counting of the elector's votes and prior to inauguration, thereby effectively evading adjudication altogether. Adjudication after inauguration resulting in the removal of a popularly elected official would have disastrous effects on the public's faith in the electoral process.

However, should this Court agree with defendants that this matter would only be ripe after McCain's imminent nomination at the Republican National Convention, this would not be proper grounds for dismissal. Instead, plaintiff would respectfully request that this Court only stay the hearing on the merits until after McCain's official nomination.

VI. Plaintiff Has Stated A Claim For Which Relief Can Be Granted

Plaintiff has asked the court to provide relief by: (1) declaring Senator John McCain ineligible to the Office of President; and (2) ordering Senator John McCain to withdraw his candidacy for this nomination. Should this Court issue these orders, the delegates that were apportioned to McCain would be released and free to support a candidate who is eligible to the Office of President. In the State of New Hampshire, N.H. Rev. Stat. § 659:93 ¶ VI states, "If a presidential candidate has received a share of the delegates as a result

of the presidential primary but withdraws as a presidential candidate at any time prior to the convention, his pledged delegates shall be released by the candidate and each delegate is free to support any candidate of his political party who may be his choice as a candidate for president." Other states likely have similar provisions for reassigning delegates for candidates who withdraw.

VII. The Eligibility Of A Candidate Is Not A Nonjusticiable Political Question

Contrary to defendants' assertion that "one can scarcely imagine a greater aggrandizement of the Judiciary's authority," Article III of the Constitution has granted this Court the authority to interpret the meaning of "natural born Citizen" as it applies to the eligibility of the Office of President. The Electoral College has no authority at this time to determine a candidate's eligibility and will not have any such authority until after the presidential election. Neither will Congress have authority to determine the eligibility of the president-elect until after the Electoral College has chosen a president. At this time, this Court and only this Court has the authority as granted by the Constitution to act on this matter.

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

Only a person who is eligible to the Office of President has a right to run as a candidate, whether in the state primaries or in the national presidential election. To allow otherwise, especially when that candidate's ineligibility is intentionally and fraudulently hidden from the public, permits and invites voter disenfranchisement. Any corroboration, including by a political party would be to aid voter disenfranchisement and must not be allowed.

Plaintiff has not directly addressed the defendants' First Amendment rights to perpetuate this fraud and disenfranchisement, because they have no such rights. 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 state aid and acted with state officials in the execution of the New Hampshire and other state primaries. McCain has also accepted aid from the United States in the form of campaign finance assistance and protection from the United States Secret Service. The First Amendment does grant state actors the right to disenfranchise voters.

Defendants have not successfully stated any reason that the ruling by the Supreme Court that the "selection of party nominees ... makes the party ... an agency of the state"[5] *Smith v. Allwright*, 321 U.S. 649, 664 (1944) should not apply here.

[5] 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.

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.

IX. Senator John McCain Is Native Born To the Republic of Panama

Defendants have chosen to bypass the authority of this Court to rule on the credibility of evidence, instead asking this Court to admit the opinion of a web log to which they have submitted a copy of McCain's birth certificate. However, plaintiff does recognize this Court's authority and hereby submits a copy of McCain's birth certificate[6] (see attached), issued by the Panama Canal Health Department to this Court for review. This document was provided by Don Lamb, the legal representative of the Panama Railroad Company, which recorded McCain's birth. Don Lamb attests by affidavit (see attached) that the Panama Railroad Company recorded the live birth of John Sidney McCain III in the city of Colon, Panama.

Absent any real credible evidence to the contrary, the discussions regarding citizenship status for those born on United States military bases overseas are now moot. McCain was not born on a United States military base, nor was he born on any territory sovereign to or under the jurisdiction of the United States. McCain was born in the city of Colon in the Republic of Panama thereby establishing McCain as native-born to the Republic of Panama and a ***naturalized*** citizen of the United States.

X. 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.

Due that the most effective relief can be granted prior to the Republican National Convention which begins on September 1, 2008, plaintiff respectfully requests that a trial date be scheduled early enough so that final relief could be granted prior to September 1, 2008, foregoing, if necessary, the pre-trial hearing and discovery.

Respectfully submitted,

Date: July 21, 2008

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[6] A typographical error in the filing date was correctly changed from 1926 to 1936.

Certificate of Service

I hereby certify that a copy of the foregoing pleading was served on the defendants pursuant to Fed.R.Civ.P 5 (b)(2)(E) by USPS first class mail to:

1. Charles G. Douglas, III, Douglas, Leonard & Garvey, P.C., 6 Loudon Road, Suite 502, Concord, NH 03301
2. Matthew D. McGill, Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Ave, Washington, D.C. 20036
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