UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILEY S. DRAKE, et al., Plaintiffs/Appellants, v. BARACK HUSSEIN OBAMA, et al., Defendants/Appellees.	NO. 09-56827 D.C. No. 8:09-CV-00082-DOC Central District of California Santa Ana
PAMELA BARNETT, Captain, et al., Plaintiffs/Appellants, v. BARACK HUSSEIN OBAMA, et al., Defendants/Appellees.	NO. 10-55084 D.C. No. 8:09-CV-00082-DOC Central District of California Santa Ana

APPELLEES' ANSWERING BRIEF

APPEAL FROM THE
THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA
SA CV 09-00082 DOC

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I. COUNTER-STATEMENT OF ISSUES ON APPEAL

Whether the District Court properly dismissed Appellants' claims in this case pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the Federal Rules of Civil Procedure because: (1) the court lacked subject matter jurisdiction over Appellants' claims related to Appellee President Barack Obama's eligibility for office because they had no standing regarding such claims; (2) the case presented non-justiciable political questions; (3) the court lacked subject matter jurisdiction over Appellants' Quo Warranto claims; (4) the court lacked subject matter jurisdiction and Appellants failed to state a claim for relief regarding their claims under the Freedom Of Information Act; and, (5) Appellants failed to state legally cognizable claims for relief as to all remaining defendants.

II. STATEMENT OF JURISDICTION

The District Court lacked subject matter jurisdiction over Appellants' claims. The statutory basis for jurisdiction in this Court is 28 U.S.C. § 1291. The District Court entered a final and appealable Order granting Appellee's Motion To Dismiss on October 29, 2009. (CR 89; ER 1.)[1] The Court will note that there are two sets of Appellants in this case. They will hereafter be referred to respectively as the "Drake" Appellants or the "Barnett" Appellants. The Drake Appellants filed their Notice of Appeal on November 16, 2009 (CR 94), and the Barnett Appellants filed their Notice of Appeal on January 17, 2010 (CR 109). Both Notices of Appeal were timely. Fed.R.App.P. 4(a)(1)(B).

[1] "CR" refers to the Clerk's Record, and is followed by the document control number. "ER" refers to Appellants' Excerpts of Record and is followed by the applicable page number. Notations in brackets are the page or paragraph number on the exhibit itself. "AOB" refers to Appellants Opening Brief.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Distilled to its essence, this case sought an adjudication of President Barack Obama's eligibility to be the President of the United States. Indeed, in the opening paragraph of the First Amended Complaint, Appellants alleged:

> "Plaintiffs bring this lawsuit to seek, above all, a declaratory judgment pursuant to 28 U.S.C. § 2201-2202, deciding whether Defendant Barack Hussein Obama can show by clear and convincing evidence that he is a natural born citizen of the United States of America within the meaning of Article II, Section I (sic) of the Constitution of the United States, and therefore whether he is qualified, or unqualified, for the position which he has held, de facto, if not de jure, since January 20, 2009." (E.R. 614.)

At paragraph 34 of the First Amended Complaint, Appellants alleged that President Obama:

> "is a foreign National, citizen of Indonesia, and possibility still citizen of Kenya, usurping the position of the President of the United States of America and the Commander-in-Chief." (emphasis supplied). (E.R. 627.)

The First Amended Complaint contained numerous other references demonstrating that what Appellants were seeking from the District Court was nothing less than a trial concerning President Barack Obama's eligibility to hold office.

In granting the motion by Appellees to dismiss the action, the District Court concluded that it lacked subject matter jurisdiction as to Appellants' causes of action related to claims that the President is ineligible for the office, because

Appellants failed to establish standing on injury-in-fact and redressability grounds. (E.R. 5-25.)

Appellants also sought relief from the District Court in the form of a quo warranto writ. The District Court dismissed this cause of action for improper venue, holding that exclusive jurisdiction over any such writ against President Obama would lie with the United States District Court for the District of Columbia, if at all.

The District Court also dismissed Appellants claims arising under the Freedom of Information Act because the claims did not apply to the named defendants and, even if the claims had been properly applied, the Appellants failed to exhaust their administrative remedies.

Finally, in addition to President Barack Obama, Appellants named as Defendants in the action Michelle Obama, Hillary Clinton, Joseph Biden, and Robert Gates. The District Court dismissed any and all claims against them for failure to state claims for relief.

B. COURSE OF PROCEEDINGS BELOW AND STATEMENT OF FACTS

On January 20, 2009, after Barack Obama was sworn in as President and took office, Appellants Keyes, Drake, and Robinson filed this action in the District Court. As found by the District Court, the action was filed at 3:26 p.m. Pacific Standard Time, following President Obama's formal assumption of office. The 44 plaintiffs listed in the First Amended Complaint, filed by the Barnett Appellants in the District Court on July 15, 2009, can be divided into six groups: (1) active military personnel; (2) former military personnel; (3) state representatives; (4) federal taxpayers; (5) alleged relatives of President Obama; and (6) political candidates. Two of the political candidate plaintiffs, Wiley S. Drake and Markham

Robinson were represented below, and are being represented on this appeal, by Attorney Gary Kreep. As noted above, these Appellants will be referred to hereinafter as the "Drake" Appellants. The remaining plaintiffs below, and on this appeal, are represented by Attorney Orly Taitz, and will be referred to as the "Barnett" Appellants. As noted by the District Court in its Order Regarding Defendants' Motion To Dismiss, filed on October 29, 2009, the political candidate plaintiffs Alan Keyes and Wiley Drake received a total of four hundredths of one percent of the popular vote for President in the 2008 Presidential Election. (E.R. 2.) Moreover, the Drake Appellants did not contest the argument made below that, from a simple mathematical analysis, they were not on the ballot in enough states in the 2008 Presidential Election to even hope that they could gain the requisite 270 electoral votes to win the Presidency or Vice Presidency of the United States.

IV. STANDARD OF REVIEW

This court reviews de novo a District Court's dismissal of an action for lack of subject matter jurisdiction. *Foster v. United States*, 522 F.3d 1071, 1074 (9th Cir. 2008).

V. SUMMARY OF ARGUMENT

The Order of the District Court dismissing this action should be affirmed in all respects. The District Court correctly found that it lacked subject matter jurisdiction of the action because appellants lacked standing to bring it, on the grounds that appellants could neither show injury-in fact nor redressability, and because it presented non-justiciable political questions. Regarding Appellants' quo warranto claims, the District Court properly found that any action seeking a writ of quo warranto against the President of the United States would be properly venued, if at all, only in the United States District Court For The District Of Columbia.

With respect to Appellants' Freedom Of Information Act claims, the District Court properly dismissed those claims because the Act does not apply to the named defendants and for lack of exhaustion of administrative remedies.

As to Defendants Michelle Obama, Hillary Clinton, Joseph Biden, and Robert Gates, the District Court properly dismissed all claims against them for failure to state any claim for relief.

Finally, the attempts by the Barnett Appellants to overturn the District Court's decision on the grounds that the court was biased or intimidated are based on arguments which are false, frivolous and fanciful.

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THAT IT LACKED SUBJECT MATTER JURISDICTION OF THE ACTION

1. Appellants Lacked Standing To Bring The Action

The question of standing is a threshold determination concerning "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct 2197, 45 L.Ed.2d 343 (1975). A plaintiff bears the burden of establishing proper standing "at the outset of its case . . . ." *Sierra Club v. Environmental Protection Agency*, 292 F.3d 895, 901 (D.C. Cir. 2002). In so doing, plaintiffs must allege facts sufficient to satisfy the "irreducible constitutional minimum" of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct 2130, 119 L.Ed.2d 351 (1992). To have standing, plaintiffs must allege that they "suffered an 'injury in fact'- an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical[]' . . . . *Id*. at 560, 112 S.Ct 2130 (citations omitted). "Second, there must be a causal connection

between the injury and the conduct complained of . . . ." *Id.* (quotations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. (quotations omitted). As the District Court properly found, Appellants utterly failed to established their standing to sue.

a. Appellants Failed To Show The Required Concrete, Traceable Injury-In-Fact To Vest Them With Standing

As noted above, and as found by the District Court in its decision, Appellants were comprised of six groups which claimed standing: (1) active military personnel; (2) former military personnel; (3) state representatives; (4) federal taxpayers; (5) alleged relatives of President Obama; and (6) political candidates. As the following discussion demonstrates, the District Court properly held that all Appellants lacked standing.

(1.) Active Military Personnel

The District Court properly found that Appellant Jason Freese, as well as any other personnel on active military duty, lacked standing to bring the action. The First Amended Complaint alleged that Lt. Freese, by virtue of his status as an active duty military officer, had standing to challenge the Constitutional eligibility of the Commander In Chief, and the legality of the military chain of command. Additionally, in their Opposition to the Motion To Dismiss, Appellants argued that Lt. Freese's standing stemmed from the oath that military officers are required to take in which they swear to support and defend the Constitution. As support for this latter argument, Appellants relied primarily on *Board Of Education v. Allen*, 392 U.S. 236, 88 S.Ct 1923 (1968).

Regarding the argument made by Lt. Freese that he had standing by virtue of his presence in the chain of command, it is submitted that the District Court's holding that this was insufficient to confer standing was correct. The presence of

Lt. Freese in the military chain of command does not itself establish an injury sufficient to satisfy Article III's requirements. The President's position atop the chain of command is conferred by the Constitution, *See* U.S. Constitution Article II, § 2, cl.1, and is common to all serving members of the armed forces. The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct 2312, 138 L.Ed.2d 849 (1997) (emphasis supplied). In short, the injuries alleged by Appellant Freese, and any other Appellants who were on active military duty, were not particularized as to them, but rather, would be shared by all members of the military and therefore are an inadequate basis on which to establish standing. *See generally*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct 2925, 41 L.Ed.2d 706 (1974). Such Appellants, moreover, "point[] to no specific duty or responsibility [in their government capacity] that has been impaired – or even affected – by" President Obama's holding of office, a deficiency that is similarly fatal to their claim of Article III standing. *Rodearmel v. Clinton*, 666 F.Supp.2d 123, 129 (D.D.C. 2009) (three-judge panel) (*per curiam*).

Regarding Appellants' second argument, that Lt. Freese had standing as an "oath taker" under the *Allen* case, the District Court also correctly found against Appellants. Appellants' claims to "oath of office" standing relied upon a fundamental misreading of the *Allen* case. *Allen* recognizes at most a narrow category of injury, limited to situations in which a plaintiff faces a direct and imminent choice between "violating [his] oath" by complying with a new, specific, and unconstitutional command, or losing his job. In this case, Appellants failed to meet one of the basic prerequisites to "oath of office" standing: that they allege that defendants imposed upon them a new, specific and unconstitutional action that

they were required to take in violation of their oath. *See Allen, supra,* 392 U.S. at 241, n.5 (describing the choice). In *Allen* itself, for example, the plaintiff legislators were required to "purchase and to loan" textbooks to parochial schools using public funds, a requirement they allege violated the Establishment Clause of the First Amendment. *Id.* at 240. The District Court correctly found that Appellant Freese, and other "oath taking" Appellants herein, failed to meet the basic prerequisite for "oath of office" standing, because the injuries alleged were not sufficiently concrete to establish Article III standing. The only action that the "oath taking" Appellants are being required to take, purportedly in violation of their oath, is simply that they report for duty every day, and take orders from their military superiors, a requirement that existed before President Barack Obama was sworn into office, and a requirement that Appellants cannot allege is itself unconstitutional. It is submitted that the above discussed limitation on "oath of office" standing is necessary, in order to avoid converting every oath taking federal employee into a potential litigant, or private Attorney General, whenever his or her interpretation of the Constitution differs from that of his or her superiors. *See City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 Fd.2d 231, 238 (9th Cir. 1980); *see also Rodearmel, supra,* 666 F.Supp.2d at 130.

For the foregoing reasons, the holding of the District Court that plaintiffs below who were active duty military personnel lack standing to bring this action was correct in all respects and should be affirmed.

(2.) Former Military Personnel

The District Court properly found that those plaintiffs below who were either inactive or former military personnel lacked standing to bring the action. A prerequisite for Article III standing is that the injury alleged be "actual or imminent, not conjectural or hypothetical," and that the injury must be likely, not

merely speculative. *Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. at 560-61 (citations omitted). Because the inactive or former military personnel are not subject to any orders from the Commander in Chief, these appellants alleged that they had standing because of the possibility that they could be called back to service at any time and would at that point have to follow the orders of a Commander in Chief who they allege does not meet the eligibility requirements to hold the position.

The District Court properly concluded that the chance that individuals in this class would be called back to active duty was hypothetical and/or speculative, and therefore Appellants could not show an injury that was actual or imminent and likely, as opposed to speculative. *Accord, Kerchner v. Obama*, 612 F.3d 204, 208 (3rd Cir. 2010) (former military personnel lack standing to challenge President Obama's fitness to hold office on the ground that "it is conjectural").

For the foregoing reasons, the District Court's decision that inactive or former military personnel failed to meet Article III standing requirements was correct and should be affirmed by this court.

(3.) State Representatives

The First Amended Complaint alleged that several of the plaintiffs who were identified as "State Representatives" had "unique standing," because they are responsible for receipt of federal funds, and expenditures thereof, and "receipt of funds from any officer without legal authority would be complicity in theft or conversion." (*See* First Amended Complaint ¶-8, C.R. 22 at 8). The District Court properly found that the alleged injury-in-fact to these plaintiffs, consisting of the alleged threat of liability for theft or conversion, was highly speculative, and neither actual nor imminent. It is submitted that this holding of the District Court was in all respects proper and should be affirmed. *See City of South Lake Tahoe,*

supra, 625 F.2d at 238 (exposure of plaintiffs to civil liability was only speculative wherein no lawsuit was currently threatened); *See also O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct 669, 38 L.Ed.2d 674 (1974) (considering that "attempting to anticipate" whether respondents will be charged with a crime, which will possibly lead to suffering a constitutional violation, takes the Court into the "area of speculation and conjecture").

For the foregoing reasons, the District Court's decision that "State Representatives" failed to meet Article III standing requirements was correct and should be affirmed by this Court.

(4.) Federal Taxpayers

The District Court properly rejected the contentions made by Appellants that they had standing to challenge President Obama's allegedly unconstitutional Presidency by virtue of their status as federal taxpayers. Appellants conceded that current Supreme Court precedent would not allow for standing in this situation, but encouraged the Court to expand the Supreme Court holding in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct 1942, 20 L.Ed.2d 947 (1968), and declare that they have standing to bring the action. As the District Court properly recognized, holdings of the Supreme Court subsequent to its decision in *Flast* have steadfastly refused to expand *Flast* beyond its narrow confines. The holding in *Flast* was limited to Establishment Clause claims, and *Flast* clearly required that, in order for taxpayer status to create standing, the taxpayer must demonstrate a nexus between the challenged congressional spending and a constitutional right. *See, e.g. Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 605, 611, 127 S.Ct 2553, 168 L.Ed.2d 424 (2007) (requiring a "link" between congressional action and constitutional violation). The District Court correctly found that Appellants did not show a nexus between any challenged spending provision passed by Congress

and the constitutional requirement that the President be a natural born citizen. *See Schlesinger v. Reservists Comm. to Stop the War*, *supra*, 418 U.S. 208, 228, 94 S.Ct 2925, 41 L.Ed.2d 706 (1974) (taxpayers did not have standing because they failed to establish a nexus between the challenged act and the constitutional violation where the challenged action was one of the Executive Branch).

Based upon the foregoing, it is respectfully submitted that the District Court's holding that Appellants who were taxpayers did not fit within the extremely narrow confines of *Flast* and its progeny was in all respects correct, and should be affirmed.

(5.) Alleged Relatives of President Obama

The First Amended Complaint alleged that plaintiff Kurt Fuqua had "traced his genealogy to be common with Mr. Obama's," and therefore had standing by virtue of this familial relationship and "concerns of the family medical history." (*See* First Amended Complaint at ¶ 49, 52, C.R. 22). The District Court properly found that plaintiff Fuqua lacked standing on two grounds. First, the Court correctly found that Fuqua's injury from an allegedly ineligible President will be no greater than any common citizen's injury simply because he is allegedly related to President Obama. Accordingly, plaintiff Fuqua's injury was not sufficiently particularized and unique to him to establish standing. Second, to the extent that plaintiff Fuqua, or any other plaintiff below, sought to establish standing by alleging damage to his interest in seeing to it that the government is properly administered in accordance with law, such damage would be insufficient to establish standing. It is well settled that an injury to "the generalized interest of all citizens in constitutional governance" is too abstract to satisfy standing requirements. *Schlesinger v. Reservists Comm. To Stop The War*, *supra*, 418 U.S. 208, 217, 220; *see Kerchner v. Obama*, *supra*, 612 F.3d at 208; *see Berg v. Obama*,

586 F.3d 234 (3rd Dir. 2009); *see Hollander v. McCain*, 566 F.Supp.2d 63 (D.N.H. 2008).

For the foregoing reasons, it is submitted that the District Court's holding that alleged relatives of President Obama lacked standing was correct and should be affirmed by this Court.

(6.) Political Candidates

The Drake appellants herein consist of Wiley S. Drake and Markham Robinson. As the District Court noted in its opinion below, Drake was the Vice Presidential nominee for the American Independent Party in the 2008 Presidential election on the California ballot, and Robinson was a pledged Presidential elector for the American Independent Party in the 2008 Presidential election on the California ballot. With respect to the Barnett appellants, their camp includes Alan Keyes, who was the Presidential nominee for the American Independent Party (also called "America's Independent Party" on some ballots) in the 2008 Presidential election, and Gail Lightfoot, who was a Vice Presidential nominee for the American Independent Party in the 2008 Presidential election. None of these appellants has contested the fact that they were not on the ballot in enough states in the 2008 Presidential election to garner the requisite 270 electoral votes to win the Presidency or Vice Presidency of the United States.

Although the district court did not deem it necessary to resolve the issue, Appellants cannot demonstrate a particularized injury-in-fact traceable to Defendants' conduct as would be necessary to establish standing. They were simply not on the ballot in enough states to hope to win 270 electoral votes, and were, therefore, in the same category for standing purposes as any voter or concerned citizen. To put it another way, the relief sought by appellants, consisting of a determination by the Court of the eligibility of the President to hold

office, and, possibly, his removal from office, would have "no more directly and tangibly benefit[ted] [them] than . . . the public at large . . . ." *Lujan, supra*, 504 U.S. at 573-74.

The Drake appellants argued below, and on this appeal, that the Court need not consider their likelihood of winning the election in assessing whether or not they had standing. Their argument is that the injury they suffered was the deprivation of the right to run for office on a fair playing field against only candidates who meet the Constitutional requirements to serve as President. As the District Court noted, under this theory, the alleged injury is not that of being deprived of the chance to win, but rather being deprived of the chance to compete against only "legitimate" candidates. In their Opening Brief, the Drake appellants stated that their interest in having a fair competition for the Presidency (which they allege was harmed by the President's supposed ineligibility to run for President)

> "is akin to the interest of an Olympic competition, where one of the competitors in an athletic competition is found to be using performance enhancing drugs, but is not removed despite a violation of the rules, and all of the athletes who have trained for the event legitimately are harmed if that disqualified contestant remains as the contestants would not be competing on a level playing field."

It is submitted that the foregoing "competitor standing" argument being made by the Drake appellants is without merit. The argument assumes a fact which does not exist: to wit, that appellants actually took the minimum steps

required to compete in, and to win, the election.[2] For reasons known only to them, the political candidate appellants chose not to compete for the Presidency nationally, or even in enough states to afford them a chance to win the requisite 270 electoral votes. By virtue of this fact, they cannot demonstrate "competitor standing," because they were not deprived of the ability to win the Office. Any "injury" sustained by them by virtue of the election of Barack Obama, therefore, was no greater than any other voter or concerned citizen.

In summary, all "political candidate" appellants herein lack standing because they cannot show any concrete and particularized injury-in-fact. Even if this case had been filed prior to President Obama's election and inauguration, it is submitted that the absolute irreducible minimum requirement for "competitor standing" of these appellants would have to be that they qualified to be on the ballot in enough states in the 2008 Presidential election to enable them to win the 270 electoral votes necessary to become President.

b. Appellants Failed to Satisfy the Redressability Requirement for Standing

As outlined above, an essential element of standing requires that it be likely, as opposed to merely speculative, that the injury alleged by a plaintiff will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife, supra*, 504 U.S. at 561. The redressability element "requires the court to examine whether 'the court has the power to right or to prevent the claimed injury.'" *Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1023 (9th Cir. 1985) (quoting *Gonzales v. Gorusch*, 688 F.2d 1263, 1267 (9th Cir. 1985)).

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[2]Indeed the dictionary definition of the word "compete" is "to strive or contend with another or others, as for a profit or a prize;vie." "Vie" is defined as "to strive for victory or superiority, contend, compete, as in an athletic contest." The American Heritage Dictionary Of The English Language, 1976.

Even assuming, arguendo, that some of the purported "injuries" alleged by appellants satisfied the Article III requirement of "injury-in-fact," the District Court correctly held that no appellant could demonstrate that any injury complained of could be redressed by a Court. First, as more fully discussed later in this Brief, the political question doctrine precludes redress to any appellant, because such redress would improperly arrogate to this Court jurisdiction over political questions as to the eligibility of the President which the Constitution entrusts exclusively to the House and Senate.

The allegations made by Appellants below and on this appeal suffer from other defects of redressability as well. To the extent that redress of the Drake Appellants' injury relies upon a "do-over" of the election, that cannot be the proper remedy for the unlawful conduct which they allege. Even if a court somehow possessed the authority to declare a sitting President ineligible to hold office – which, for the reasons stated hereafter, a court does not – the result would not be to order a new national election. The Drake appellants accordingly would be unable to obtain redress for their alleged grievance even if they could theoretically prevail in this action.

Regarding the military plaintiffs, any injury which they may be suffering has never been identified with any precision at all. Certainly, military personnel may face risk of injury in the course of their duties, but the military plaintiffs have pointed to no such concrete risks that they themselves presently face. Even if the Court could find standing on the basis of such injuries, however, it is even more highly speculative that any such injury would be redressed by a change in the identity of the Commander-in-Chief. The military plaintiffs, therefore, cannot meet the redressability prong on this basis.

Moreover, the military plaintiffs also lack standing because members of the military cannot challenge the orders of a superior in a judicial forum. *See*, *e.g. Chappell v. Wallace*, 462 U.S. 296, 300, 304, 103 S.Ct 2362, 76 L.Ed.2d 586 (1984) (holding that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers" because "that relationship is at the heart of a necessarily unique structure of the military establishment" and noting that the "disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." (quotation omitted); *United States v. Stanley*, 483 U.S. 669, 682-83, 107 S.Ct 3054, 97 L.Ed.2d 550 (1987) (holding that members of the military cannot raise Constitutional claims against military officials for injuries incident to service because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate").

Finally, appellants further fail to meet the redressability element required for Article III standing because a Court is without power to enjoin the President. It appears that, in order to redress the alleged injuries herein, the Court would need to issue an injunction against President Obama that, *inter alia*, would require him to prove his eligibility to be President of the United States. Additionally, at page 4 of their First Amended Complaint, [C.R. 22] the Barnett appellants stated that they are seeking injunctive relief to enjoin the appointment of Article III judges, the U.S. Attorney for the District of Columbia, and a new Supreme Court Justice. Further, at page 4 of the First Amended Complaint, the Barnett appellants sought to enjoin President Obama from making new military deployments overseas. As the District Court correctly recognized, it could not, consistent with the doctrine of separation of powers, issue any such injunctions. *See*, *e.g. Newdow v. Bush*, 355

F.Supp.2d 265, 280-82 (D.D.C. 2005), and cases cited therein. Similarly, to the extent that appellants assert that they do not wish to enjoin the President to do anything, but are rather simply asking that a declaratory judgment be rendered, they also fail to satisfy the redressability element necessary for standing herein because such a judgment would be a legal nullity. *Id*.

In summary, the holding of the District Court that appellants lacked standing to bring this action because, *inter alia*, they utterly failed to satisfy the redressability requirement was in all respects correct and should be affirmed.

c. The District Court Correctly Found That This Case Presents Non-Justiciable Political Questions

It is well settled that when the United States Constitution makes a "textually demonstrable constitutional commitment" of an issue to another branch of government, other than the judiciary, that issue presents a non-justiciable political question. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct 691, 710, 7 L.Ed.2d 663 (1962). The political question doctrine serves to "restrain the Judiciary from inappropriate interference in the business of the other branches of Government" by prohibiting the Courts from deciding issues that properly rest within the province of the political branches. *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S.Ct 1964, 109 L.Ed.2d 384 (1990). Because "disputes involving political questions lie outside of the Article III jurisdiction of federal courts," such cases are to be dismissed for want of jurisdiction. *Corrie v. Caterpiller*, 503 F.3d 974, 980, 982 (9th Cir. 2007).

The issues sought to be raised by appellants herein, regarding both whether President Obama is a "natural born citizen of the United States" and therefore eligible to be President as well as any purported claims raised by any criminal

statutes cited by the Barnett appellants in their First Amended Complaint, are to be judged, according to the text of the Constitution, by the legislative branch of the government, and not the judicial.

At the outset, the Electoral College is the constitutionally created body responsible for selecting the President of the United States. *See* U.S. Constitution, Article II, Section 1, cl. 2; *Id.* Amend. XXIII Section 1; *Williams v. Rhodes*, 393 U.S. 23, 43, 89 S.Ct 5, 21 L.Ed.2d 24 (1968) (Harlan, J., concurring) ("the [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation . . . ."). Where no candidate receives a majority of the electoral votes, the Constitution commits to the House of Representatives the authority to select the President and, in so doing, to evaluate the candidates' eligibility. *See* U.S. Constitution Amendment XII. Similarly, the Twentieth Amendment exclusively grants Congress the responsibility for selecting a President when a candidate elected by the Electoral College does not satisfy the Constitution's eligibility requirements. *See Id.* Amendment XX, Section III (". . . the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."); *see also Id.* Amendment XII. Thus, pursuant to the Constitution, review of Presidential eligibility after the Electoral College has acted rests in Congress.

The Constitution's textual commitment of this responsibility is a responsibility that Congress has embraced. Both the House and Senate have Standing Committees with jurisdiction to decide questions relating to Presidential elections. *See* S.R. 25.1n(1)(a)(5), (9) (The Senate Committee on Rules and

Administration has jurisdiction over "proposed legislation, messages, petitions, memorials, and other matters relating to . . . Federal elections generally, including the election of the President, Vice President, and Members of Congress[,] as well as "Presidential succession") (E.R. 572). *See also* H.R. 10(j)(12). (E.R. 580). Federal legislation further details the process for counting electoral votes in the Congress. Most important for this appeal, after the Electoral College has voted, any objection to a Presidential candidate's eligibility for office, to the extent such review is required, rests with Congress. *See* 3 U.S.C. § 15.

In summary, it is clear, from the text of the Constitution, and the relevant statutory law implementing the Constitution's textual commitments, that challenges to the eligibility of a candidate for President must be presented to Congress.

Moreover, what appellants were really seeking in this case was nothing less than a determination by the United States District Court that President Obama should be removed from office. The preposterous nature of this quest by appellants is readily apparent. No single United States District Court (or for that matter any other Court) has the power to try the question of whether a sitting President of the United States should be allowed to remain in office. As the D.C. Circuit observed under vastly different circumstances, issues relating to the fitness, competence, and eligibility of a President to continue to serve in office are non-justiciable political questions for a very good reason:

> Although the primary reason for invoking the political question doctrine in our case is the textual commitment of impeachment trials to the Senate, the need for finality also demands it. *See Baker v. Carr*, 369 U.S. at 210, 82 S.Ct 706. . . .For . . . Presidents . . . the intrusion of the

> courts would expose the political life of the country to months, or perhaps years, of chaos. Even if the courts qualified a finding of justiciability with a rule against stays or specific relief of any kind, their review would undermine the new President's . . . legitimacy for at least as long as the process took. And a declaratory action *without* final relief awarding the office to one person or the other could confound matters indefinitely.

Nixon v. United States, 938 F.2d 239, 245-46 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224, 113 S.Ct 732, 122 L.Ed.2d 1 (1992).

The District Court correctly found that litigation of the issues sought to be raised by appellants below would constitute a great intrusion by the Court into the political life of the other branches. Such an intrusion would do violence to the principle of separation of powers, an equally-important basis to recognize that such political questions are outside the jurisdiction of the Court. *See Baker v. Carr*, *supra*, 369 U.S. at 210 ("the non-justiciability of a political question is primarily a function of the separation of powers."); *Id.* at 217 (setting forth the elements typically describing a political question).

The District Court also correctly found that despite their attempts to couch their arguments regarding redress in other terms, redress of those harms alleged by appellants would require removal of President Obama from office. The Court correctly found, therefore, that the proper political question analysis under *Baker v. Carr* was whether the power to remove a sitting President from office is textually committed by the Constitution to another branch of the government. The answer to that question, the Court correctly found, must be yes, because the Constitution

grants to Congress the sole power of impeachment. *See* U.S. Const. Art I § 2 cl. 5 and Art I § 3, cl. 6.

For the foregoing reasons, the District Court's holding that this case presents non-justiciable political questions was in all respects correct and should be affirmed.

B. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' QUO WARRANTO CLAIMS

The District Court dismissed appellants' quo warranto claims, holding that venue of any action seeking a quo warranto writ against President Obama was proper, if at all, only in the United States District Court For The District of Columbia. Appellants below conceded that the District of Columbia would be the appropriate district in which to bring the writ, but, as the District Court noted, they alleged that the District Court For The District of Columbia and the United States Attorney for the District of Columbia were biased against appellants and bringing any such action there would be futile. Appellants therefore requested that the District Court apply the District of Columbia's quo warranto statute pursuant to California choice-of-law provisions. The District Court correctly rejected this argument, holding that it could not apply the quo warranto statutes of the District of Columbia in this case because those statutes granted exclusive jurisdiction to the United States District Court For The District of Columbia in such cases.

The District of Columbia Code has two statutes regarding the initiation of a quo warranto proceeding. The first provides that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute such an action on their own motion, or at the request of a third person. *See* District of Columbia Code § 16-3502. If the Attorney General or the United States Attorney decides to institute a quo warranto action at the request of a third

person, they must first seek leave of court. *Id*. The District of Columbia Code also provides that if the Attorney General or the United States Attorney "refuses to institute a quo warranto proceeding on the request of a person interested, the interested person may apply to the court by certified petition for leave to have the writ issued." District of Columbia Code § 16-3503.

The Court of Appeals for the District of Columbia Circuit has held that a quo warranto action against a public official may be brought only by the Attorney General or the United States Attorney. *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) (citing *United States v. Carmody*, 148 F.2d 684, 685 (D.C. Cir. 1945)). The Court of Appeals stated that the rationale for this is that challenges to authority by which a public office is held "involve a right belonging to the whole body of the public which can be protected only by a public representative." *Carmody*, 148 F.2d at 685.

It is submitted that the holdings of the Court of Appeals for the District of Columbia in *Andrade* and *Carmody* are rooted in the doctrine of standing. As discussed above, a plaintiff raising only a generally available grievance about government, and seeking relief that no more directly and tangibly benefits him than it does the public at large, does not state an Article III case or controversy. Because appellants are neither the Attorney General of the United States nor the United States Attorney for the District of Columbia, they do not have standing to bring a quo warranto action challenging the President's right to hold office. Moreover, even if the foregoing precedent did not firmly preclude appellants from bringing a quo warranto action, and even if venue were proper in this District, the United States Supreme Court has suggested that the "interested person" bringing the action would have to be actually entitled to the office himself. *See Newman v. United States ex rel Frizzell*, 238 U.S. 537, 547 (1915). As discussed above, none

of the appellants herein could ever establish that they were actually entitled to the office themselves.

Accordingly, for all of the reasons set forth above, this Court should affirm the District Court's dismissal of appellants' quo warranto claims.

C. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' FREEDOM OF INFORMATION ACT CLAIMS

The District Court correctly dismissed appellants' claims under the Freedom of Information Act.

First, the District Court correctly found that the provisions of the Freedom of Information Act do not apply to any of the defendants. FOIA only applies to entities which qualify as an "agency." 5 U.S.C. § 552(a)(2). The statute defines "agency" as "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President, or any independent regulatory agency)." *Id.* at § 551 (1). The District Court found that all the named defendants herein are individuals, not agencies, and therefore plaintiffs failed to state a claim against these individuals under FOIA. Accordingly, the District Court correctly dismissed all FOIA claims.

Moreover, even if FOIA were applicable, it is well settled that the exhaustion of a party's administrative remedies "is required under the FOIA before that party can seek judicial review." *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986); *Dettmann v. U.S. Department of Justice*, 802 F.2d 1472, 1476 (D.C. Cir. 1986) ("It goes without saying that exhaustion of remedies is required in FOIA cases."); *Hymen v. Merit Systems Protection Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986) ("The FOIA requires that administrative appeals be exhausted before suit

may be brought in federal court."). As the District Court noted, the appellants virtually conceded in their First Amended Complaint that they had not exhausted the required administrative remedies under the Freedom of Information Act. In fact, during the entirety of the proceedings below, appellants never pointed to one instance wherein they had exhausted their administrative remedies in pursuing a claim under the Act.

It is submitted that the dismissal by the court of appellants' claims under FOIA was correct as a matter of law, and should be affirmed.

D. THE CLAIMS AGAINST THE DEFENDANTS OTHER THAN PRESIDENT OBAMA WERE PROPERLY DISMISSED

As the District Court correctly noted, plaintiffs failed to state any legally cognizable claims against defendants Michelle Obama, Hillary Clinton, Joseph Biden, or Robert Gates. The District Court's dismissal of the action against these defendants was, therefore, in all respects proper.

E. THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' REQUESTS TO ENTER DEFAULT OF DEFENDANTS

Appellants argue that they were only required to serve President Obama as an individual under Federal Rules of Civil Procedure 4(e). They further argue that they did so by substituted service on February 10, 2009, and the President did not respond within the allotted time, and accordingly, that their request to the court to enter a default judgement against President Obama was improperly denied.

It is submitted that the court's decision to deny entry of default judgment against the President was in all respects proper. It is clear beyond question that the underlying lawsuit would necessarily operate against the President in his official

capacity, by virtue of the fact, *inter alia*, that appellants are seeking his removal from office. That being the case, service upon the President was required to be made in accordance with the provisions of Rule 4(i) of the Federal Rules of Civil Procedure which requires, at a minimum, that service also be made upon the United States Attorney's Office for the District in which the action is pending. Appellees responded in a timely fashion after service was made in accordance with Rule 4(i).

Accordingly, the court's denial of appellants' requests for entry of default was in all respects proper.

F. THE BARNETT APPELLANTS' REMAINING CONTENTIONS ARE WITHOUT MERIT

1. Appellants' Attacks Upon The District Court Are Frivolous

Throughout the proceedings below, and in their Opening Brief to this court, the Barnett appellants, through their attorney, have weaved into their filings and oral argument statements regarding the District Court, which are frivolous and fanciful, completely unsupported by any facts whatever, and in the words of the District Court, constitute "rhetoric seeking to arouse the emotions and prejudices of [Plaintiffs' attorney Taitz'] followers rather than the language of a lawyer seeking to present arguments through cogent legal reasoning."

Perhaps the best example of this conduct is the argument made by counsel for the Barnett appellants that the District Court was, by turns, either biased against her case, or intimidated from adopting her positions. Neither of these contentions is supported by any competent and admissible evidence or facts.

It is submitted that counsel's attempts to demonstrate that the District Court was prejudiced and biased against her are utterly frivolous, and completely without merit. *See also Rhodes v. MacDonald*, 670 F.Supp.2d 1363 (M.D. Ga 2009).

2. The District Court Did Not Err In Denying Appellants' Request To File A Second Amended Complaint

In their Opening Brief, the Barnett appellants argue that the District Court erred in denying them leave to file a Second Amended Complaint. In its September 23, 2009 Minute Order, the District Court ordered that appellants must file a regularly noticed motion asking for leave of court to file a Second Amended Complaint, if that is what they wished to do. (C.R. 70) . The only thing remotely resembling such a motion filed by appellants below was their statement in the last paragraph of their Motion for Reconsideration, filed below on November 9, 2009, that if the Court would not grant their motion for reconsideration, in the alternative, they were seeking leave to file a "Second Amended Complaint against Mr. Obama specifically on Declaratory Relief, R.I.C.O., quo warranto, 1983, Common Law Fraud, and Breach of Contract..." (C.R. 90 at p. 8). The District Court denied the motion for reconsideration, finding that it largely repeated the same arguments made by appellants in their Opposition and oral argument on the Motion to Dismiss, and finding that there were no factual, legal, or other grounds upon which to grant a motion for reconsideration. Because the Motion for Reconsideration only obliquely mentioned appellants' request to file a second amended complaint, the Court did not address it specifically. However, it is submitted that there is nothing in the record below to counter the argument that any second amended complaint filed by appellants would have been futile. Therefore, even assuming

that the Motion for Reconsideration filed by appellants below were also construed as a Motion to File a Second Amended Complaint, the District Court did not err in denying it.

VII. CONCLUSION

For the foregoing reasons, the District Court's order dismissing this action should be affirmed in all respects.

DATED: October 13, 2010.

Respectfully submitted,

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VIII. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee states that there are no known related cases pending in this Court.

DATED: October 13, 2010.

Respectfully submitted,

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