IN THE CIRCUIT COURT OF THE SECOND JUDICAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

MICHAEL C. VOELTZ,

Plaintiff,

CASE NO. 2012-CA-00467

BARACK HUSSEIN OBAMA, Florida Democratic Party Nominee to the 2012 Democratic Party Convention, KEN DETZNER, Secretary of State of Florida, and FLORIDA ELECTIONS CANVASSING COMMISSION,

Defendants.
_____/

ORDER GRANTING BARACK OBAMA'S AND SECRETARY OF STATE KEN DETZNER'S MOTION TO DISMISS AMENDED COMPLAINT

This case is before me on motions to dismiss filed by Defendants Obama and Detzner. The amended complaint challenges the nomination of Defendant Obama as the Democratic Party's nominee for the office of President of the United States, pursuant to Section 102.168, Florida Statutes. The Plaintiff alleges that candidate Obama is not eligible for that office because he is not a "natural-born citizen" within the meaning of Article II, Section 1 of the Constitution of the United States. Because I find that the plaintiff has not and cannot state a cause of action for the relief requested under Section 102.168, Florida Statutes, I grant the motions to dismiss with prejudice.

There are several deficiencies in the complaint, but the biggest problem, and one which cannot be overcome by amending the complaint, is that Section 102.168, Florida Statutes, is not applicable to the nomination of a candidate for Office of President of the United States. This statute provides, in pertinent part, as follows:

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

Plaintiff argues that President Obama has been nominated as the Democratic Party's candidate for the office by virtue of the fact that he had no opposition for the Presidential Preference Primary Election. Under Florida Statutes Section 97.021(28), "'Primary election' means an election held preceding the general election for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state, county, or district office." Because Mr. Obama was the only candidate for that primary election, Plaintiff argues that Florida Statutes, Section 101.252(1) applies. That provision reads as follows:

> "Any candidate for nomination who has qualified as prescribed by law is entitled to have his or her name printed on the official primary election ballot. However, when there is only one candidate of any political party qualified for an office, the name of the candidate shall not be printed on the primary election ballot, **and such candidate shall be declared nominated for the office."** [Emphasis added].

Florida's Supreme Court has confirmed that "[w]hen only one candidate for a political party qualifies, that candidate is the party's nominee." *Republican State Exec. Comm. v. Graham*, 388 So. 2d 556, 557 (1980).

If the plaintiff was challenging the candidate's eligibility for any other office, his analysis would be correct and these provisions would apply. The Office of President of the United States, however, is treated differently under Florida law. In every other political office, any person can qualify to run as a Democrat or Republican in a primary election and if she receives the greatest number of votes, she is, by law, that party's nominee for the general election. Candidates for these other offices are required to file certain documents and pay a qualifying fee (or sufficient

petitions) during a specific time period. In 2012 that qualifying period ran from noon on Monday, June 4, 2012 until noon on Friday, June 8, 2012.

Presidential candidates do not qualify during that period or pursuant to that process. Rather, Section 103.021, Florida Statutes, provides that presidential electors are designated by the respective political parties before September 1 of each presidential election year and nominated by the Governor. [1] The respective major political parties determine their nominee at a national convention pursuant to rules that the parties draft and approve. The Presidential Preference Primary Election in Florida is an integral part of that process for the parties, but as it relates to Florida law, there is no qualifying and no certification of nomination of the candidate as a result. Thus, under Florida law, Mr. Obama is not presently the nominee of the Democratic Party for the office.

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[1] Section 103.021(1) and (2), Florida Statutes (2011), provides as follows:

> Nomination for presidential electors.—Candidates for presidential electors shall be nominated in the following manner:
>
> (1) The Governor shall nominate the presidential electors of each political party. The state executive committee of each political party shall by resolution recommend candidates for presidential electors and deliver a certified copy thereof to the Governor before September 1 of each presidential election year. The Governor shall nominate only the electors recommended by the state executive committee of the respective political party. Each such elector shall be a qualified elector of the party he or she represents who has taken an oath that he or she will vote for the candidates of the party that he or she is nominated to represent. The Governor shall certify to the Department of State on or before September 1, in each presidential election year, the names of a number of electors for each political party equal to the number of senators and representatives which this state has in Congress.
>
> (2) The names of the presidential electors shall not be printed on the general election ballot, but the names of the actual candidates for President and Vice President for whom the presidential electors will vote if elected shall be printed on the ballot in the order in which the party of which the candidate is a nominee polled the highest number of votes for Governor in the last general election.

The question remains whether or not this case should be stayed in anticipation that Mr. Obama will, in fact, be nominated at the national convention of the Democratic Party. Will the Plaintiff's election contest then be ripe for adjudication? I conclude not, as there has not been, and never will be, a nomination by primary election or qualification as contemplated under Florida law. Neither the Plaintiff nor any other elector will determine by vote the nomination. Thus, regardless of who is nominated by the party at the national convention, Plaintiff would not be able to amend his complaint to challenge the nomination under Section 102.168, Florida Statutes.

Even if Section 102.168, Florida Statutes, was applicable to a challenge to the "nomination" of a candidate for Office of the President of the United States, the amended complaint fails to state a cause of action for the relief requested. Specifically, the amended complaint alleges that the candidate has not demonstrated, and the Secretary of State has not confirmed, that the candidate is a "natural born citizen" as required by the United States Constitution. It is the plaintiff's burden, however, to allege and prove that a candidate is not eligible. The Secretary of State also has no affirmative duty, or even authority, "to inquire into or pass upon the eligibility of a candidate to hold office for the nomination for which he is running." *Taylor* v. *Crawford,* 116 So. 41, 42 (Fla. 1928); *see also Cherry,* 265 So. 2d at 57 (stating that nothing "places a duty upon or empowers the Secretary of State to conduct an independent inquiry with respect to circumstances or fact dehors the qualifying papers"); *Hall* v. *Hildebrand,* 168 So. 531, 364 (Fla. 1936) (finding that the filing officer "has neither the responsibility nor the authority to pass judgment upon the supposed ineligibility of candidates for office").

Plaintiff alleges that the Secretary's oath to "support the U.S. Constitution" "creates an absolute ministerial duty" on him to determine the eligibility of presidential nominees. I disagree. "The duties that fall within the scope of mandamus are legal duties of a specific, imperative, and ministerial character as distinguished from those that are discretionary." *Cherry* v. *Stone,* 265 So. 2d *56, 51* (Fla. 1972). An oath to "support the U.S. Constitution" is not a "specific, imperative" duty to do anything of a ministerial character, let alone a specific imperative to verify the eligibility of presidential nominees or candidates. *Cherry v. Stone, supra* at 57. Plaintiff's allegations are thus insufficient to justify a writ of mandamus directed to the Secretary.

Plaintiff's alternative request for mandamus against the Court is also insufficient for similar reasons. Plaintiff makes no allegation supporting any of the elements for a writ of mandamus against the Court. Additionally, this Court lacks jurisdiction to consider the issuance of mandamus directed to it. *See Davis* v. *State,* 982 So. 2d 1246 (Fla. 5th DCA 2008) (noting that "a court cannot logically issue a writ of mandamus to itself.")

In oral argument on the motion, the plaintiff's attorney advised the court that if given an opportunity to amend the complaint, the plaintiff could affirmatively allege that the candidate was not born within the territorial jurisdiction of the United States. Thus, that defect could theoretically be remedied. The second prong of the plaintiffs challenge, however, is also deficient and cannot be remedied. Specifically, the plaintiff alleges that even if the candidate was born within the territorial jurisdiction of the United States, he was not born of two parents who were American citizens and therefore cannot be a "natural born citizen" as required by the Constitution.

I have reviewed and considered the legal authority submitted by the Plaintiff and the Defendants on this issue and conclude as a matter of law that this allegation, if true, would not make the candidate ineligible for the office. Article II, Section 5 of the Constitution of the United States provides:

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

"The Constitution does not, in words, say who shall be natural-born citizens." *Minor v. Happersett,* 88 U. S. 162, 167 (1875). However, the United States Supreme Court has concluded that "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States." Other courts that have considered the issue in the context of challenges to the qualifications of candidates for the office of President of the United States have come to the same conclusion. *See Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008) ("Those born 'in the United States, and subject to the jurisdiction thereof' have been considered American citizens under American law in effect since the time of the founding and thus eligible for the presidency.") (citations omitted); *Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009) (citing *Wong Kim Ark*, and holding that both President Obama and Senator John McCain were "natural born citizens" because "persons born within the borders of the United States are 'natural born [c]itizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents.").

Thus, for procedural and substantive reasons, the complaint is legally deficient and should be dismissed. The question remains, should it be dismissed with prejudice, i.e., without leave to amend. Dismissal with prejudice should only be granted if it conclusively appears there

is no possible way to amend the complaint to state a cause of action. As noted above, I can't see how the Plaintiff could amend the complaint and proceed under Section 102.168, Florida Statutes.

Plaintiff could perhaps contest the election if the candidate is successful. The Defendants argue that such a challenge is foreclosed as well, but as the complaint sought to challenge only the nomination, I do not reach the issue of whether Plaintiff might properly file an election contest action after the general election. Suffice it to say that Plaintiff could not, under any existing facts, amend the complaint to contest an election that has not occurred.

Plaintiff suggests the possibility of a declaratory judgment claim, but I don't see how Plaintiff, as an individual voter, would have standing to seek declaratory relief. In short, I am unable to conceive of any other legal theory upon which the Plaintiff could proceed at this time relative to the relief sought.

While these motions to dismiss were under advisement, Plaintiff filed a second amended complaint which was not authorized. The Secretary and the Commission have moved to strike it, which I grant.

Therefore, for the reasons expressed herein, it is ORDERED AND ADJUDGED, that:

The Motions to Dismiss the Amended Complaint are GRANTED and the Plaintiff's Amended Complaint is hereby dismissed with prejudice. The Second Amended Complaint is stricken.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 29th day of June, 2012.

TERRY P. LEWIS, Circuit Judge

cc: Copies to Counsel of Record