Is Another Qui Tam Action the Answer?

"THAT WAS THEN…AND NOW IS NOW"

by [Joseph DeMaio](), ©2020

(Jan. 30, 2020) — The recent [post]() by the intrepid P&E editor on the "eligibility" issue has generated a lot of comments from faithful P&E readers. This is a good thing, because despite all of the continuing efforts of the leftist/DNC mainstream media – and even some on the Fox/right side of the political spectrum – to ignore, trivialize and marginalize those who would dare to suggest that "the Emperor had no clothes," the issue of Barack Hussein Obama Jr.'s failure to demonstrate his purported constitutional eligibility as being a "natural born Citizen"… just… won't… die.

The main reason it won't die is because proof that BHO was in fact – instead of in fantasy or in cyberspace – eligible under the "natural born Citizen" clause of the Constitution, Art. 2, § 1, Cl. 5 – has never been produced. Never.

In fact, for many years, various actors, Deep State and otherwise, have sought to concoct and engineer numerous counterfeit and/or fraudulent artifacts seeking to "establish" or "confirm" that Monsieur Obama was, in reality, eligible to serve as president when, in fact, he very likely was not. And now that the synthetic nature of those artifacts has been stripped away, the issue has again come to the fore in the context of "cheating" in an election as addressed in the editor's post cited above.

As regular P&E readers know, there are basically two primrose paths down which the artifact creators have led the public in the ruse to "prove" – purportedly – that BHO was constitutionally eligible. There was first the Hawaiian birth certificate ruse, involving a clumsy and wholly unpersuasive computerized image of a document said to confirm that he was actually born at the Kapi'olani Hospital in Honolulu, Hawaii on Aug. 4, 1961.

The other flowered path was the "Congressional Research Service" angle, where, in a series of memoranda and reports, the CRS attempted to assert, among other things, that the U.S. Supreme Court had long ago held that a person who was a "citizen at birth" or a "citizen by birth" under the 14th Amendment was therefore, *ipso facto*, also a "natural born Citizen" for eligibility purposes, regardless of the citizenship status of the parents.

Both of these paths have been addressed (and demolished) here at The P&E. The first path is annihilated here; here; here and here. The second path is destroyed, among other places, here; here and here.

But returning to the point: some commenters have suggested that the way to bring the issue back into the national "front burner" spotlight and to trigger "action" instead of just "words about action" is to withhold or escrow tax dollars until President Trump agrees to take dispositive action against all the bad actors behind, among other defalcations, the eligibility fraud. Respectfully, that approach would have a better chance of success if the IRS were on board. Don't hold your breath.

On the other hand, that comment got your faithful servant thinking: was there not a P&E post in the distant past where the intrepid editor interviewed one of the first challengers of BHO's eligibility, an attorney (and a Democrat yet…), one Phillip Berg? Sure enough, back in 2010, this post appeared: https://www.thepostemail.com/2010/10/21/obama-eligibility-attorney-to-hold-rally-in-dc-this-saturday/. The interview included reference by Mr. Berg to a *qui tam* action he had

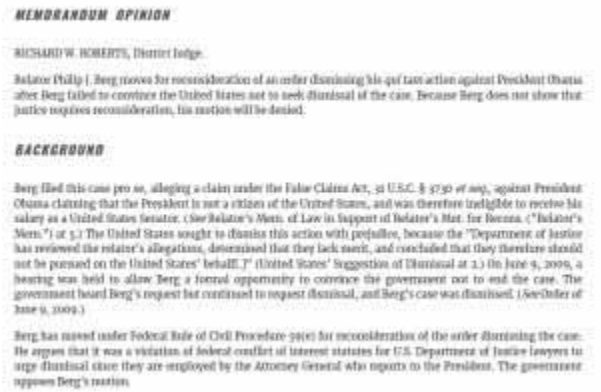
filed, which action had been dismissed and with the dismissal affirmed by the D.C. Circuit Court of appeals shortly before the P&E interview.

Stay with me here, because the rest of this gets somewhat convoluted.

A qui *what*? A "qui tam" legal action is one maintained by a private person (called a "relator") seeking to adjudicate a "false claim" against the United States (usually monetary in nature) when the government has declined to take action. Qui tam actions are incorporated under the federal false claims statute, 31 U.S.C. § 3730.

However, under that statute, because the relator brings the action on behalf of both him/her as well as the United States, it is provided that if, for whatever reason, the government thinks that despite its inaction, it is not a good idea for the action to proceed, it has an absolute right to dismiss the action. Court decisions have characterized this right as "unfettered." This is what happened to Berg's case.

In the original proceeding following the filing of Berg's *qui tam* complaint – alleging that Obama was not a U.S. citizen (likely born in Kenya) and therefore seeking recovery of Obama's salary as a U.S. Senator (all senators must be U.S. citizens) before he was elected President – the United States gave the notice of dismissal.



MEMORANDUM OPINION

RICHARD W. ROBERTS, District Judge.

Relator Philip J. Berg moves for reconsideration of an order dismissing his *qui tam* action against President Obama after Berg failed to convince the United States not to seek dismissal of the case. Because Berg does not show that justice requires reconsideration, his motion will be denied.

BACKGROUND

Berg filed this case pro se, alleging a claim under the False Claims Act, 31 U.S.C. § 3730 *et seq.*, against President Obama claiming that the President is not a citizen of the United States, and was therefore ineligible to receive his salary as a United States Senator. (*See* Relator's Mem. of Law in Support of Relator's Mot. for Recons. ("Relator's Mem.") at 3.) The United States sought to dismiss this action with prejudice, because the "Department of Justice has reviewed the relator's allegations, determined that they lack merit, and concluded that they therefore should not be pursued on the United States' behalf." (United States' Suggestion of Dismissal at 2.) On June 9, 2009, a hearing was held to allow Berg a formal opportunity to convince the government not to end the case. The government heard Berg's request but continued to request dismissal, and Berg's case was dismissed. (*See* Order of June 9, 2009.)

Berg has moved under Federal Rule of Civil Procedure 59(e) for reconsideration of the order dismissing the case. He argues that it was a violation of federal conflict of interest statutes for U.S. Department of Justice lawyers to urge dismissal since they are employed by the Attorney General who reports to the President. The government opposes Berg's motion.

https://www.leagle.com/decision/infdco20090922558

The notice came in the form of a "Suggestion of Dismissal" filed in the court stating that the "[D]epartment of Justice has reviewed the relator's allegations, determined that they lack merit, and concluded that they therefore should not be pursued on the United States' behalf[.]" *See Berg v. Obama*, 656 F.Supp. 2d 107, 108 (D.C.D.C. 2009). That "suggestion of dismissal," upon which the court acted in dismissing Berg's action, came on the watch of and presumably with the knowledge of Monsieur Obama's then newly-appointed U.S. Attorney General: Eric Holder.

Mr. Berg sought review of that decision in the U.S. Court of Appeals for the District of Columbia. Following a review of the lower court's opinion dismissing Berg's case, the Court of Appeals affirmed the dismissal, thereafter also denying Berg's motion for rehearing. *See Berg v. Obama*, 383 Fed.Appx. 7 (D.C. Cir. 2010). In affirming the

dismissal, the Court of Appeals stated that the "False Claims Act give[s] the government an *unfettered right* to dismiss [a qui tam] action," *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and the government's decision to dismiss the action is *not reviewable*, *see Hoyte v. American National Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008)." (Emphasis added).

There are several relevant points to be examined here, although that may prove difficult if one does not have access to subscription-based legal databases. This is because the Court of Appeals opinion was "de-selected" for publication in the Federal Reporter series, so access is limited to "membership" or "pay-to-read" websites. Relax: your faithful servant has such access.

First, the panel that affirmed the dismissal of Berg's *qui tam* action consisted of three D.C. Circuit Court judges. The judges were (1) Judith Rogers, a Democrat appointed by President Clinton in 1994; (2) Merrick Garland, a Democrat appointed by President Clinton in 1997 and later, in 2016, nominated by Barack Hussein Obama Jr. to be the replacement for Justice Antonin Scalia; and (3) Janice Rogers Brown, a Republican nominated to the Court of Appeals by President George W. Bush in 2003, but not confirmed by the Senate due to Democrat opposition until 2005.

Thus, in 2010, the panel that affirmed the dismissal of Berg's complaint consisted of one judge appointed by President George Bush and two judges appointed by President Clinton, with one of those "likely" registered Democrat jurists – Judge Garland – offered up by Monsieur Obama to replace Justice Scalia after his untimely passing. A cynic – but certainly not your faithful servant – might be tempted to wonder whether Obama's consideration in 2016 of Garland to replace Scalia could have had anything to do with his being grateful for Garland's ruling six years earlier in Mr. Berg's case. Just sayin'….

Second, the Court of Appeals opinion held that the right of the United States to dismiss *qui tam* actions like Berg's was "unfettered," citing its own prior decision in the *Swift* case as authority. In *Swift*, it was also held that such decisions to dismiss are "not reviewable," again citing is own prior decision in the *Hoyte* case as its authority. Although the U.S. Supreme Court denied review ("certiorari denied") in the *Swift* case – suggesting, but not declaring, that it did not disagree that the government's right to dismiss was "unfettered" – no such denial of Supreme Court review occurred in the *Hoyte* case because none was sought.

Moreover, in the *Hoyte* case, the opinion made it clear that the government's "unfettered" right to dismiss a relator's *qui tam* action was still conditioned on the absence of "special circumstances" warranting an exception "such as fraud on the court." *See Hoyte*, 518 F.3d at 64. One could argue that the alteration of Supreme Court opinions by ellipsis omission, and then offering up to a court the altered version as being authentic, constitutes a "fraud on the court."

Third, while in the P&E interview, Mr. Berg stated that the Court of Appeals ruling affirming the dismissal of his *qui tam* action would be appealed to the Supreme Court,

that appeal apparently never took place. While Mr. Berg had sought interim relief from the Supreme Court prior to the final September 20, 2010 ruling, no filings were thereafter made. That does not mean it wasn't worthwhile: indeed, without Phillip Berg's tenacity back then, the likelihood of the issue remaining alive today might not even exist.

Whether the decision to forego Supreme Court review was because Mr. Berg thought the "not reviewable" rule rendered his efforts moot or because some other reason existed is not known. That which is known, however, is that his brave *qui tam* adventure in 2010, involving players like Eric Holder, was probably doomed from the start.

But that was then – 2010 – and now is now – 2020. There is a new sheriff in town, one not afraid to call the "Deep State" by its true name, and an Attorney General whose surname is not "Holder" or "Napolitano" or "Lynch." Moreover, the composition of the Supreme Court – now including Justices Gorsuch and Kavanaugh – would seem to be, at least "on paper," more inclined to address, head-on, the still unanswered question of whether BHO usurped the office of the presidency because he was not a "natural born Citizen" as required by the Constitution.

Which brings us to the question: why not file a new *qui tam* action seeking to recover *not* his salary while in that office or the cushy $3.3 million "transition needs" stipend he received when he left office, but instead to recoup his *current* pension and retirement benefits and terminate all future payments?

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The main pension amount now set by federal law (3 U.S.C. § 102 note) is $210,700.00 annually. Granted, that is a lot less than Hunter Biden was being paid on the board of Burisma Holdings, but then again, even in retirement, BHO is probably doing more on a golf course than Biden ever did at Burisma *other* than provide access to his dad while he was Vice President under BHO. And, by the way, "standing" in the "relator" to bring the lawsuit is conferred by the statute itself. Sweet.

If BHO has usurped the office of the presidency, then he cannot lawfully be seen as entitled to the retirement benefits – taxpayer dollars – provided under federal law. As part of a *qui tam* action – assuming the current federal government would not file for a dismissal of the action, as did the Holder Justice Department, a matter still up in the air – the "relator" in the action could engage in "discovery" procedures. Specifically, the relator could depose Mr. (and Mrs.) Obama; pose interrogatories to them; request them to admit material facts; and – *hot dang* – demand the production of *original* documents bearing upon whether Monsieur Obama was actually born in Honolulu, Hawaii or

elsewhere. This goes directly to the question of his "entitlement" to a federal pension at all: the pension is intended to benefit past presidents; it is not intended to benefit past usurpers.

Admittedly, there are a number of pitfalls to such a gambit, not the least of which would be finding a person or organization courageous enough and wealthy enough to do it. Another "issue" to be dealt with would be the "outrage" coming from Obots and the mainstream media appendage of the Democrat Party, screaming that there will be "blood in the streets."

Yet another matter would be whether, in the polarized and hyper-toxic, even pre-civil war environment in which we now live, the Trump Administration would be prepared to "stand down" and allow the action to proceed or, as in the Obama/Holder years, file a "suggestion of dismissal." If that were to happen, one might be tempted to treat it as the crowning act of the "Deep State-Lite." Fortunately, these questions and issues do not need to be answered now. That which *does* need to be addressed is whether a proposal for another *qui tam* action of this nature makes sense to anyone. Like… Attorney General Barr… District Attorney Durham… Jay Sekulow… Joe diGenova …. Donald J. Trump?

Anybody out there?