

Barack Obama's Citizenship

Berg v. Obama (R. Barclay Surrick, E.D. Pa. 2:08-cv-4083)

A few days before the 2008 Democratic national convention, an attorney filed a pro se complaint seeking to have Barack Obama declared ineligible to be President, alleging that he was not a natural-born citizen. The judge denied immediate relief at an ex parte proceeding where the plaintiff could not confirm service of the complaint on the defendants. Over the next eight weeks, the court received three pro se motions to intervene: one to support the plaintiff, one to challenge John McCain's citizenship, and one to know the facts of the case. The judge dismissed the action for lack of standing, and the court of appeals affirmed the dismissal.

Subject: Getting on the ballot. *Topics:* Pro se party; getting on the ballot; intervention; Electoral College.

A few days before the 2008 Democratic national convention, an attorney in Lafayette Hill, Pennsylvania—in Montgomery County, the county northwest of Philadelphia County—filed a pro se federal action in the Eastern District of Pennsylvania to have Barack Obama declared ineligible to be President because he was not a natural-born citizen.¹ The plaintiff filed with his complaint a motion for a temporary restraining order against Obama's candidacy and nomination.²

The court assigned the case to Judge R. Barclay Surrick, who held a hearing the next day.³ “Defendants were not represented at the hearing. Plaintiff advised the Court that he had faxed a copy of the Complaint and Motion for Temporary Restraining Order as well as notice of the hearing to Defendants, but that he could not confirm that they had been received by Defendants.”⁴ Judge Surrick denied immediate injunctive relief.⁵

Over the next eight weeks, the court received three pro se motions to intervene.⁶ On September 18, a person listing San Diego, California, as a mail-

1. Complaint, *Berg v. Obama*, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008), D.E. 1; *Berg v. Obama*, 586 F.3d 234, 237 (3d Cir. 2009); *Berg v. Obama*, 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008); see Kevin Amerman, *Federal Lawsuit Alleges Obama Isn't Citizen of U.S.*, Allentown Morning Call, Aug. 28, 2008, at A4; Kevin Amerman, *Obama, DNC Fight Local Man's Lawsuit*, Allentown Morning Call, Oct. 18, 2008, at A3 [hereinafter *Obama, DNC Fight*] (listing court proceedings); Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 Mich. L. Rev. First Impressions 31, 32 (2008); see also James Janega, *Suit Disputing Obama Status at High Court*, Chicago Trib., Dec. 4, 2008, at 12 (describing this case as the most famous case questioning Obama's citizenship).

2. Temporary-Restraining-Order Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008), D.E. 2; *Berg*, 574 F. Supp. 2d at 512.

3. Docket Sheet, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 21, 2008); *Berg*, 574 F. Supp. 2d at 512.

4. *Berg*, 574 F. Supp. 2d at 512 n.1.

5. Order, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 4; *Berg*, 574 F. Supp. 2d at 512; see Amerman, *Obama, DNC Fight*, *supra* note 1.

6. See Amerman, *Obama, DNC Fight*, *supra* note 1.

ing address sought to intervene to argue that Republican nominee John McCain was not a natural-born citizen either, because he was born in the Panama Canal Zone.⁷ A forensic psychologist in Columbus, Georgia, moved on October 7 to support the original plaintiff's complaint.⁸ On October 15, the court received with a Brigham Young University Law School fax cover sheet a motion to intervene to know the facts of the case.⁹

Judge Surrick dismissed the action on October 24; the plaintiff did not have standing on the core claim, and his amended complaint included no other valid cause of action.¹⁰ Judge Surrick dismissed all remaining pending motions as moot.¹¹

On October 30, the plaintiff appealed and sought a stay of the presidential election.¹² The court of appeals denied the stay on the following day.¹³ On December 9, the appellate court denied the plaintiff's motion to enjoin votes for Obama in the Electoral College.¹⁴ On November 12, 2009, the court affirmed Judge Surrick's dismissal.¹⁵ The court had denied mandamus relief to the pro se plaintiff challenging McCain's citizenship on December 22, 2008.¹⁶

7. Intervention Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Sept. 18, 2008), D.E. 11; see Amerman, *Obama, DNC Fight*, *supra* note 1.

8. Intervention Motion, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Oct. 7, 2008), D.E. 16.

The psychologist also filed a motion under her own name to appear as Jane Doe and asking that the motion be sealed. Doe Motion, *id.* (Oct. 7, 2008), D.E. 17. Later she filed a request for judicial notice under her own name. Request for Judicial Notice, *id.* (Oct. 20, 2008), D.E. 23. The docket sheet does not show any action on her anonymity or sealing requests.

9. Intervention Motion, *id.* (Oct. 15, 2008), D.E. 19.

10. *Berg*, 574 F. Supp. 2d 509; *Berg v. Obama*, 586 F.3d 234, 237–38 (3d Cir. 2009); see Amended Complaint, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 14; see also Michael Hinkelman, *Judge Rejects Montco Lawyer's Bid to Have Obama Removed from Ballot*, Phila. Daily News, Oct. 25, 2008, at 3.

11. Order, *Berg*, No. 2:08-cv-4083 (E.D. Pa. Aug. 22, 2008), D.E. 29.

Judge Surrick issued a similar order on July 24, 2009, Order, *id.* (July 24, 2009), D.E. 34, which disposed of an additional pro se motion to intervene, Intervention Motion, *id.* (Oct. 30, 2008), D.E. 32.

12. Docket Sheet, *Berg v. Obama*, No. 08-4340 (3d Cir. Oct. 30, 2008).

13. Order, *id.* (Oct. 31, 2008), *cert. denied*, 555 U.S. 1126 (2009); *Berg*, 586 F.3d at 238.

14. Order, *Berg*, No. 08-4340 (3d Cir. Dec. 9, 2008); *Berg*, 586 F.3d at 238.

15. *Berg*, 586 F.3d 234.

16. *In re Mitchell*, 304 F. App'x 113 (3d Cir. 2008).