

EXPEDITE

Hearing Set: 10/27/08
Time: 10:00 a.m.
Before: John Erlick
Chief Civil Judge

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STEVEN R. MARQUIS,

Plaintiff,

v.

SAMUEL S. REED, in his official
capacity as Secretary of State of the
State of Washington,

Defendant.

NO. 08-2-34955-1 SEA

RESPONSE TO MOTION TO
REQUEST PRELIMINARY
INJUNCTION HEARING,
AND SECRETARY OF STATE'S
MOTION TO DISMISS

I. INTRODUCTION

Plaintiff, Steven R. Marquis, brings this case to question the qualifications of Senator Barack Obama to serve as President of the United States. Mr. Marquis suggests the possibility that, based upon rumors of a kind that have become all too common in the era of the Internet, Senator Obama might not be a natural born United States citizen. Mr. Marquis does not assert as a fact that Senator Obama is not a natural born citizen, and straightforwardly admits that he has no intention of proving that he is not; he merely asserts that the Defendant, Secretary of State Sam Reed, should be required to either obtain evidence of Senator Obama's qualifications or decertify him from the ballots already issued to Washington's 3.5 million registered voters.

Mr. Marquis is wrong, and he is entitled to no relief, for four reasons: (1) this case is barred by the statute of limitations set forth in RCW 29A.68.011; (2) this case is barred by the

1 doctrine of laches; (3) this case should be dismissed for failure to join an indispensable party,
2 Senator Obama; and (4) Mr. Marquis is not entitled to relief on the merits of this matter because,
3 by law, the Secretary of State is precluded from inquiring into the qualifications of a candidate
4 for office beyond the four corners of a candidate's filing document.

5 **II. RELIEF REQUESTED**

6 Secretary Reed requests that this Court deny all relief requested by Mr. Marquis in this
7 action. Moreover, given that no facts are in dispute in this case and the request for injunctive
8 relief presented by Mr. Marquis necessarily requires the Court to decide the legal issues
9 presented, Secretary Reed respectfully requests that the Court advance the trial on the merits of
10 this action and consolidate it with Mr. Marquis' request for injunctive relief, and dismiss this
11 action with prejudice. CR 65(a)(2).

12 **III. STATEMENT OF FACTS**

13 It has long been known publicly that United States Senator Barack Obama is a candidate
14 for President of the United States. On August 28, 2008, that candidacy became official in
15 Washington when the National Convention of the Democratic Party formally certified to
16 Secretary Reed that Senator Obama, together with Senator Joe Biden, are that party's official
17 nominees for the offices of President and Vice President. Decl. of Nick Handy, Ex. A. During
18 the months of September and October, election officials in Washington, and in the rest of the
19 country, have prepared to conduct the 2008 general election. Ballots have been printed and
20 mailed to voters. Decl. of Handy, ¶ 6. Thousands of voters have cast their votes and returned
21 their ballots to their county election officials. *Id.*, ¶¶ 7-9. The election is under way.

22 In Washington, the vast majority of voters cast their ballots by mail. In 37 of our 39
23 counties, elections are conducted entirely by mail. Traditional polling places are opened only in
24 King and Pierce Counties, but even there the majority of votes are cast by mail. Approximately
25 95% of the votes cast statewide at the August 2008 primary were cast by mail. Decl. of Handy,
26 ¶ 5. State law requires that all vote-by-mail ballots be available no later than 20 days before the

1 election, and be mailed no later than 18 days before the election. Ballots for overseas and service
2 voters must be mailed 30 days before the election. RCW 29A.40.070. “Every county in the state
3 has, accordingly, already distributed ballots to voters pursuant to these requirements, containing
4 the names of Senators Obama and Biden as candidates for President and Vice President of the
5 United States, respectively.” Decl. of Handy, ¶ 6. In fact, not only have ballots been issued, but
6 voting is taking place. By October 21, 2008, thousands of voters had already cast their ballots
7 and returned them to their county auditors. This process will continue every day, with more
8 ballots arriving at county election offices every working day until after the election. Decl. of
9 Handy, ¶¶ 7-9.

10 Two months after the Secretary received the formal certification of Senator Obama as his
11 party’s nominee, Mr. Marquis asks this Court to order the Secretary to require that Senator
12 Obama provide proof that, if elected, he would be qualified to serve in the office of President or,
13 failing that, to decertify him from the ballots that have already been issued and cast.

14 IV. STATEMENT OF ISSUES

- 15 1. Should trial on the merits of this case be advanced, and consolidated with the
16 hearing on Mr. Marquis’ request for injunctive relief, so that this action can be
17 promptly dismissed prior to the election?
- 18 2. Is this case barred by the statute of limitations?
- 19 3. Is this case barred by the doctrine of laches?
- 20 4. Should this case be dismissed for failure to join an indispensable party?
- 21 5. Should the Court order the Secretary of State to require that a candidate for
22 President of the United States, who has been properly and timely certified by the
23 national convention of a major political as that party’s nominee for President,
24 either prove that he is a natural born citizen of the United States or decertify him
25 from ballots that have already been printed, distributed, and voted upon in an
26 ongoing election?

1 **V. EVIDENCE RELIED UPON**

2 This Response is based upon the accompanying Declaration of Nick Handy, and upon the
3 papers, pleadings and records of this Court in this case.

4 **VI. ARGUMENT**

5 **A. Trial On The Merits Should Be Advanced, So That This Case Can Be Dismissed**
6 **Prior To The Election**

7 Civil Rule 65 permits this Court to order that the trial of the action on the merits be
8 advanced and consolidated with a hearing on an application for a preliminary injunction.
9 CR 65(a)(2). Where the facts are not in dispute, consideration of a motion for preliminary
10 injunction will necessarily require the Court to decide legal issues that cut to the heart of the case.
11 *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). Upon consolidation of the
12 hearing with the trial on the merits, or upon stipulation of the parties, the Court may render a
13 final decision in a single hearing. CR 65(a)(2); *Rabon*, 135 Wn.2d at 285 n.2.

14 **B. This Case Is Barred By The Statute of Limitations**

15 Where elections are concerned, “[t]here is no constitutional right to procrastinate.”
16 *Dobson v. Dunlap*, No. CV-08-292-B-W, 2008 WL 4273200, at *1 (D.Me., Sept. 16, 2008)
17 (upholding election official’s decision to reject candidate filing as untimely).¹ The legislature has
18 recognized the necessity of ample time for election officials to prepare to conduct the election by
19 limiting judicial review as to the names of candidates appearing on the ballot to a very narrow
20 time frame. An argument that the name of any person is wrongfully certified to a general
21 election ballot can only be brought within three days after the certification of the results of the
22 previous primary. RCW 29A.68.011.² The results of the primary were certified on September 9,

23 _____
¹ Copies of all federal cases cited are attached as exhibits to this Response.

24 ² Although Mr. Marquis does not cite this statute as the basis of his action, he is nonetheless bound by
25 this statute of limitations. *Becker v. Cy. of Pierce*, 126 Wn.2d 11, 20-21, 890 P.2d 1055 (1995) (holding that the
26 substance of the requested relief, not the form of the pleading, governs the application of the statute of limitations
now codified at RCW 29A.68.011).

1 2008. RCW 29A.60.190 (primary results must be certified 15 days after the primary).³ This
2 means that the last day for filing a lawsuit contesting the right of any candidate to appear on the
3 2008 general election ballot was September 12, 2008. Mr. Marquis did not file this case until
4 October 10, 2008, nearly a month late. Statutes of limitation regarding elections assume
5 particular importance because the public interest demands that actions regarding an election be
6 speedily filed and resolved. *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004)
7 (applying the statute of limitations to bar an action questioning the results of a primary).
8 Accordingly, the jurisdiction of this Court has never been properly invoked, and it cannot rule
9 upon the merits of the matter.

10 **C. This Action Is Barred By Laches**

11 Even if a clear and direct statute of limitations did not preclude this action, it would be
12 untimely under the doctrine of laches. The United States Supreme Court has recognized the
13 potential for last-minute (here, beyond last minute) litigation to interfere with the electoral
14 process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 7, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006)
15 (“Court orders affecting elections . . . can themselves result in voter confusion and consequent
16 incentive to remain away from the polls.”); *see also Washington State Republican Party v. King*
17 *Cy.*, 153 Wn.2d 220, 226, 103 P.3d 725 (2004) (Chambers, J., concurring) (“there is little to
18 commend judicial intervention into the electoral process before the process is complete.”).

19 It is no longer time to argue about how to conduct the election; it is now taking place.
20 This claim is accordingly barred by the doctrine of laches. “Laches is an implied waiver arising
21 from knowledge of existing conditions and acquiescence in them.” *Lopp v. Peninsula Sch. Dist.*
22 *401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). The elements of laches are:

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24
25 ³ *See also*, the Secretary’s public notice that the results of the primary were certified on that date,
26 available at: http://www.secstate.wa.gov/office/osos_news.aspx?i=bHT5cjeL70XIZ2%2ftX%2fRSZw%3d%3d.

1 (1) knowledge or reasonable opportunity to discover on the part of a potential
2 plaintiff that he has a cause of action against a defendant; (2) an unreasonable
3 delay by the plaintiff in commencing that cause of action; (3) damage to
4 defendant resulting from the unreasonable delay.

5 *Id.* at 759. Each of those elements is satisfied here. As noted, Senator Obama's candidacy has
6 been common knowledge for some time, and nomination has been a matter of official record
7 since August 28, 2008. Decl. of Handy, Ex. A. Moreover, the materials submitted by
8 Mr. Marquis reveal that he was aware of rumors and innuendo concerning Senator Obama's
9 citizenship as early as August 19, 2008. Mot. To Request Prelim. Inj. Hr'g, Decl., Ex. N at 53
10 (email message from Mr. Marquis to Secretary Reed). Given these facts, and the looming
11 election date, Mr. Marquis' delay in filing this action was objectively unreasonable. Finally, the
12 consequences of granting his relief at this late date, after ballots have been issued and voting is in
13 progress, would constitute damage not only to the Secretary, but to the voting public.

14 **D. This Action Should Be Dismissed For Failure To Join An Indispensible Party**

15 A candidate running for elected office exercises a constitutional right. *Dumas v. Gagner*,
16 137 Wn.2d 268, 285, 971 P.2d 17 (1999) ("Since the right to participate in the government is the
17 common right of all, it is the unqualified right of any eligible person within the state to aspire to
18 any of these offices, and equally the unqualified right of the people of the state to choose from
19 among those aspiring the persons who shall hold such offices."). At the heart of Mr. Marquis'
20 claim lies the right of Senator Obama to appear on the ballot, but Mr. Marquis has not joined the
21 Senator.

22 Since Senator Obama's interests are clearly at issue in this case, the burden clearly
23 falls upon Mr. Marquis, and upon no one else, to join him in this matter. CR 19. His failure
24 to do so constitutes inexcusable neglect. *Tellinghuisen v. King Cy. Council*, 103 Wn.2d 221,
25 224, 691 P.2d 575 (1984) (failure to initially name necessary parties constituted inexcusable
26 neglect); *Suquamish Indian Tribe v. Kitsap Cy.*, 92 Wn. App. 816, 824, 965 P.2d 636 (1998)
(inexcusable neglect found where a party knew the identity of necessary parties at all times

1 and failed to name them). This Court cannot reasonably conduct a hearing regarding a
2 candidate's qualification to appear on the ballot without obtaining jurisdiction over the
3 candidate. To proceed otherwise is manifestly unfair.

4 Since the participation of Senator Obama is essential to this litigation, and since
5 nobody other than Mr. Marquis bore the burden of obtaining jurisdiction over him for this
6 expedited proceeding, this case should be dismissed with prejudice based on inexcusable
7 neglect in bringing this indispensable party before this Court.

8 **E. The Secretary Of State Has No Authority To Require Proof Of Senator Obama's**
9 **Citizenship**

10 Washington law is well established that elections officials lack the authority to inquire
11 into the qualifications of candidates for office. "[I]t is clear that an officer with whom an
12 aspiring candidate must file may not reject a declaration of candidacy on the grounds that the
13 candidate is ineligible if that rejection is based on extrinsic factual knowledge or involves the
14 interpretation of statutory or constitutional provisions." *Fischnaller v. Thurston Cy.*, 21 Wn.
15 App. 280, 282-83, 584 P.2d 483 (1978) (citing *State ex rel. McCaffrey v. Superior Court*, 20
16 Wn.2d 704, 149 P.2d 156 (1944); *State ex rel. McAulay v. Reeves*, 196 Wash. 1, 81 P.2d 860
17 (1938)).

18 Unlike candidates for other offices, candidates for President and Vice President do not
19 file declarations of candidacy. RCW 29A.24.030 (requiring a declaration of candidacy for
20 candidates for all offices "other than president of the United States, vice president of the
21 United States, or an office for which ownership of property is a prerequisite to voting").
22 Instead, Presidential and Vice Presidential candidates qualify to the ballot through a
23 certification that they have been nominated by a convention of a major or minor political
24 party. RCW 29A.56.320, .360. On August 28, 2008, the National Convention of the
25 Democratic Party officially certified Senators Obama and Biden to the Secretary of State as
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1 their nominees. Decl. of Handy, Ex. A. The party also filed a slate of candidates for
2 presidential elector, as required by law. Decl. of Handy, ¶ 3.

3 Having received the documentation required by law, the Secretary had no authority to
4 inquire beyond the four corners of the documentation into Senator Obama’s qualifications.
5 *Fischnaller*, 21 Wn. App. at 283. This makes sense because it is the role of the elections
6 official to fairly and neutrally conduct the election, not to become the arbiter of candidate
7 qualifications. *McAulay*, 196 Wash. at 3 (concluding that the Secretary could not assume the
8 authority to investigate and determine candidate qualifications). Given the strong public
9 policy in favor of eligibility for public office (*Dumas*, 137 Wn.2d at 284), Washington law is
10 clear that the Secretary may not look beyond the Democratic Party’s certification.
11 *Fischnaller*, 21 Wn. App. at 283. That document suggests no basis for concluding that
12 Senator Obama is not qualified. Decl. of Handy, Ex. A.

13 Mr. Marquis not only fails to offer any evidence to support any other factual
14 conclusion, but he expressly disavows any intent to do so. Mr. Marquis states in his pleading
15 commencing this action, “[t]hese allegations and statements are not intended to be proof of the
16 status of Mr. Obama’s citizenship or lack thereof.” Pet., ¶ 5.1. Instead, he asserts that the
17 facts will be determined in another case in federal court. *Id.* He asserts that he has no
18 intention of meeting the burden of proof generally required of those who commence lawsuits,
19 asserting instead that “the entire burden of proof falls on the Candidate for Office” to prove
20 his qualifications. Pet., ¶ 1.3 As noted, Mr. Marquis did not see fit to join to this action the
21 party he claims bears the burden of proof. *See* argument in Section D, above. Mr. Marquis
22 apparently believes his burden as plaintiff to be satisfied by enshrining rumors in pleadings,
23 but the law is otherwise. *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 135, 769 P.2d 298
24 (1989) (noting the general rule that a plaintiff is required to prove all elements of his or her
25 case). Having expressly disavowed any intention to prove the truth of the rumors that form
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1 the basis of his complaint, Mr. Marquis simply has no case, and the matter is now ripe for
2 dismissal with prejudice. CR 65(a)(2).

3 Moreover, the qualification of the President of the United States is ultimately a federal
4 question. After the Presidential electors vote, they transmit their results to the President of the
5 United States Senate (i.e., the current Vice President of the United States), who counts them in
6 the presence of a joint session of Congress. U.S. Const. amend. XII. The declaration of the
7 results, or of their legal effect, is not a matter for this Court to decide.

8 **VII. CONCLUSION**

9 For these reasons, this Court should deny all relief requested by the Plaintiff, and should
10 dismiss this case with prejudice.

11 DATED this _____ day of October, 2008.

12 ROBERT M. MCKENNA
13 Attorney General

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1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document and Proof of Service on all parties or their
3 counsel of record on the date below as follows:

4 Steven Marquis [] First Class Mail
5 24077 SE 56th Street [] E-mail: steve.marquis@comcast.net
6 Fall City, WA 98024 [] Fax

7 I certify under penalty of perjury under the laws of the state of Washington that the
8 foregoing is true and correct.

9 DATED this _____ day of October, 2008, at Olympia, Washington.

10 _____
11 Becky Waldron
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