U.S. District Court
for the District of Columbia Case No. 1:08-cv-02254 JR

Court of Appeals Case No. 09-5080
Consolidating No. 09-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

——————— O ———————

GREGORY S. HOLLISTER,

Plaintiff – Appellant,

v.

BARRY SOETORO, et al,

Respondents – Appellee.

——————— O ———————

CORRECTED
BRIEF *AMICUS CURIAE* OF
LAWRENCE J. JOYCE, ESQUIRE AND PHILIP J. BERG, ESQUIRE

———————

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Request For Oral Argument

This Court's *amici* respectfully request leave to present oral argument on this Brief. We believe that oral argument on this Brief will help this Court develop a proper understanding of the issues herein, and may be necessary for the proper adjudication of this case.

Certificate As To Parties, Rulings, And Related Cases

A. The Parties

The parties are the same in this Court as in the District Court, except that John D. Hemenway was only counsel, and not a party, in the District Court. The parties are Gregory S. Hollister as Plaintiff/Appellant and John D. Hemenway as Appellant. They also are Defendant/Appellee Barry Soetoro, a/k/a Barack Hussein Obama, in his capacity as a natural person, in his capacity as *de facto* President *in posse*, and in his capacity as *de jure* President *in posse*, and Defendant/Appellee Joseph R. Biden, Jr., in his capacity as a natural person, in his capacity as *de jure* Acting President *in posse*, in his capacity as *de jure* President *in posse*, and in his capacity as *de jure* Vice-President *in posse*.

B. The Rulings

The following Rulings are under review in this appeal:

1.) The Ruling of February 4, 2009 of Judge James Robertson denying the Motion to Deposit Funds with the Court, Docket #10. This Order is located in Appellant Hollister's Joint Appendix filed with this Court on November 20, 2009, at Appendix page 54.

2.) The Ruling of February 4, 2009, of Judge James Robertson holding in Abeyance the Motions for Admission *Pro Hac Vice* of Philip J. Berg, Esquire and Lawrence J. Joyce, Esquire, Docket #10. This Order is located in Appellant Hollister's Joint Appendix filed with this Court on November 20, 2009, at Appendix page 54. This Ruling has no citation.

3.) The Ruling of February 11, 2009, of Judge James Robertson refusing to accept Hollister's First Amended Complaint, Docket #12. This Order is located in Appellant Hollister's Joint Appendix filed with this Court on November 20, 2009, at Appendix page 107. This Ruling has no citation.

4.) The Ruling of March 5, 2009 of Judge James Robertson, granting Defendants' Motion to Dismiss, Docket #22 and the accompanying Memorandum thereto, Docket #21. This Order is located in Appellant Hollister's Joint Appendix filed with this Court on November 20, 2009, at Appendix page 213 and the Court's Memorandum is located in Appellant Hollister's Joint Appendix at Appendix page

208. This is reported as follows: *Hollister v. Soetoro*, 601 F.Supp.2d 179 (D.D.C. 2009).

5.) The Ruling of March 24, 2009 of Judge James Robertson, which issued a Reprimand to counsel John D. Hemenway for his participation in this suit, Docket #27. This Order is located in Appellant Hollister's Joint Appendix filed with this Court on November 20, 2009 at Appendix page 253. This is reported as follows: *Hollister v. Soetoro*, 258 F.R.D. 1 (D.D.C. 2009).

C. Related Cases

This case was not previously on review before this Court or any other Court. There are no cases involving substantially the same parties together.

***Interests Of The* Amici**

The *amici* are Lawrence J. Joyce, an attorney in Tucson, Arizona, who is the author of this lawsuit, and Philip J. Berg, an attorney in Lafayette Hill, Pennsylvania, who led the overall legal effort behind this case from its inception, and who has certain suits pending which likewise question the constitutional qualifications of Appellee Barry Soetoro to be President of the United States. The *amici* incorporate by reference the statements of their interest in this case from their Motion to File a Brief *Amicus Curiae* with this Court in this case. The *amici*

support Appellants Gregory S. Hollister and John D. Hemenway, and they support reversal of the District Court.

Authority To File This Brief

The authority to file this brief is contingent upon this Court's granting the Motion to file this Brief. No party has consented to the filing of this Brief.

Summary Of Argument

This case is not rendered moot by the Appellees' inaugurations. Expanding Impeachment to preclude removal by civil actions, especially against *de facto* officers, is not supported by the language of the Constitution or Supreme Court cases. Furthermore, *Marbury v. Madison* specifically allows at least some civil actions which test the validity of a claim to office; this would pertain to at least some of the relief Hollister asked for. In addition, Hollister's claim is "… capable of repetition, yet evading review."

Disposing of a case without affording a hearing was soundly rebuked by the Supreme Court in *Hovey v. Elliott.*

The law of the military jurisdiction adds to the uncertainty which Hollister faces.

"Property" is always intangible, even if the *res* itself is tangible.

Under *Quo Warranto*, the law recognizes Hollister's property-type interest in his office.

Soetoro's threat of attorney's fees emphasizes the First Amendment implications of this case.

In the interests of justice, the Court should reach the merits of whether a claim was stated upon which relief can be granted.

I. This Case Is Not Rendered Moot By The Inauguration Of Appellees Soetoro And Biden

As a threshold matter, there is new authority from the United States District Court for the Central District of California which touches on the viability of Appellant Hollister's claim.[1] In that case (*Barnett*), the Court was likewise faced with a question as to whether one of the Appellees in this case, Barry Soetoro (a/k/a/ Barack Obama) is constitutionally qualified to be President. The Central District of California found that now that Soetoro has been sworn in, the only way to remove him from office would be through the Impeachment Clause of the Constitution.[2] Significantly, in *Barnett* the United States admitted in open court that if that case had been filed prior to the inauguration of Soetoro, all of the

[1] *Barnett v. Obama*, et al 2009 U.S. Dist. LEXIS 101206 (C.D. Cal. Oct. 29, 2009).
[2] The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S. Const., Art. II, § 4.

defendants in that case (including an active duty member of the Armed Forces of the United States) would have had standing, and we ask this Court to take judicial notice of the fact that that admission was made.[3]

Also, although that Court was not faced with a question of mootness (because suit in *Barnett* had been filed only after Soetoro had been inaugurated), the application of the idea that Soetoro can now be removed only through the Impeachment process to the case at bar could raise an issue of mootness. Because this potential issue of mootness, which implicates the subject matter jurisdiction of the Article III Courts, is new to this case, we address this issue first.

A. The Impeachment Process Is Not The Exclusive Means Of Removing A De Facto *President From Office*

1. Expanding The Impeachment Clause To Preclude Civil Actions Against A De Facto *President Would Constitute An Impermissible Encroachment Upon The Judicial Branch*

First and foremost, the determination of the rights of the people against another party, whether by private civil action or by criminal indictment, is historically, and is by its very nature, a judicial function. For example, *Quo Warranto*, an ancient writ designed to test the qualifications of a person to hold

[3] *Barnett*, October 5, 2009 Transcript, P. 12, Lines 22-25 and Page 13, Lines 1-18; See also, *Southern Cross Overseas v. Wah Kwong Shipping*, 181 F.3d 410, 427, n. 7 (3rd Cir. 1999).

office, is adjudicated through the judicial function.[4] Any civil action designed to test the qualifications of someone to hold office prior to that person's assuming office, such as the case at bar, would likewise be decided, ordinarily, through the judicial function. (*Quo Warranto*, we note, ordinarily will not lie until the person against whom it would operate has assumed office.)[5]

By injecting the legislature into the determination of the right of the people to bring criminal process against the President, the Impeachment Clause of the Constitution, when properly perceived, is a limited, constitutionally prescribed injection of the Legislative Branch into what is ordinarily a function of the judicial sphere, not the legislative one. Picture, if you will, a circle divided into three even parts. We shall label the upper third the Executive Branch, the lower-left third the Legislative Branch, and the lower-right third the Judicial Branch. In the line between the Legislative Branch and the Judicial Branch, carve out a small notch extending from the Legislative Branch into the Judicial Branch. That is the Impeachment Clause. Of course, Courts are required to honor and respect the scope of that intrusion into the Judicial Branch, for it is an intrusion warranted by the Constitution itself.

The other side of that coin is simply this: Any expansion of the scope and application of the Impeachment process beyond its constitutionally prescribed

[4] See, Corpus Juris Secundum, *Quo Warranto*, §§ 1-7.
[5] See, Corpus Juris Secundum, *Quo Warranto* § 15.

boundaries would constitute an abrogation of the judicial function, for it would be a further expansion of the legislature into the judicial realm, one that is not in fact warranted by the Constitution.

The Supreme Court has recognized that anything which takes the whole power of one branch of Government and places it in the hands of another branch is something which violates the separation of powers.[6] And taking the whole power to adjudicate a party's rights, something which is ordinarily a function of the Judicial Branch, and abrogating that power by making a party's rights depend on a Congressional decision of whether to impeach or not, would violate the separation of powers to the extent that the Constitution does not actually require such a result.

It is thus a matter of this Court's authority as to whether this Court may or may not apply the Impeachment Clause in such a way as to prohibit civil actions designed to test the constitutional qualifications of a *de facto* President. With that in mind, we submit that the very idea that a civil action which tests the constitutional qualifications of a *de facto* President to be President could somehow constitute an intrusion on the Impeachment power of Congress is an idea which in fact states the constitutional issue precisely backwards; for such an expansion of the Impeachment Clause as the Court adopted in *Barnett*, being one not warranted

[6] *Nixon v. Administrator of General Services*, 433 U.S. 425, 442, n. 5 (1977).

by the Constitution, constitutes an intrusion on the adjudicatory power and duties of the Judicial Branch.

a.) A De Facto *Officer Is Not Someone Entitled To The Protection Of The Impeachment Process*

The status of being a *de facto* officer[7] is something which does not arise by operation of law. Quite the opposite. For instead, the status of being a *de facto* officer is something which in fact runs contrary to the operation of law, and the acts of a *de facto* officer have been considered to have a certain element of illegality.[8] Even the term "*de jure*" (*i.e.*, "concerning law") itself denotes the true status of someone who is legally qualified to hold office as being an officer of government by operation of law; the fact that the term "*de jure*" is used to distinguish such a person from someone who is not qualified to hold office bespeaks the fact that the law itself recognizes that a *de facto* officer, by contrast, is anything but an officer by operation of law.

It is therefore but a legal fiction of the highest order that the *de facto* "officer" can be thought of as being an officer of government at all. *De facto* officer status is a status which arises by necessity in order to prevent a catastrophic disruption of government;[9] to prevent such disruption; courts have been

[7] See, Corpus Juris Secundum, *Officers*, §§ 339-340.
[8] See, Corpus Juris Secundum, *Officers* § 339.
[9] See, Corpus Juris Secundum, *Officers* § 349.

exceedingly unwilling to void the acts of *de facto* officers.[10] This has been for the good of the public, though, not the *de facto* officer.[11] Significantly, however, the *de facto* officer doctrine has not been applied in every instance.

In *Nguyen v. United States*, the Supreme Court of the United States held that the affirmation of certain criminal convictions by the Ninth Circuit had to be vacated on the sole grounds that a *de facto* judge who heard the appeal was not qualified---constitutionally, or by statute---to hold that office.[12] There was nothing wrong with the Ninth Circuit's decision other than that.[13] In effect, then, *Nguyen* effectively recognizes that the *de facto* judge was not truly a judge in contemplation of law, but was instead someone who was simply exercising the functions of that office. For otherwise, if he were a true judge in contemplation of law, his official act would not have to be vacated.

In addition, as Judge Wright said for this Circuit concerning the *de facto* officer doctrine:

> [T]he court should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable.[14]

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[10] See, Corpus Juris Secundum, *Officers* § 339, 349.
[11] See, Corpus Juris Secundum, *Officers* § 349; see also, Am.Jur.2d *Public Officers* § 242.
[12] *Nguyen v. United States*, 539 U.S. 69, 77-81 (2003).
[13] *Nguyen*, 539 U.S. at 80-83.
[14] *Andrade*, 729 F.2d 1475 at 1498.(D.C. Cir. 1984) at 1498 See also, *Observation*, Am.Jur.2d, *Public Officers* § 23.

Furthermore, as mentioned above, the rule that the acts of a *de facto* officer are usually deemed valid is a rule which offers no protection to the *de facto* officer personally.[15] Accordingly, for the foregoing reasons, we submit that someone who is a *de facto* President is not someone who is entitled to the protections of the Impeachment Clause. Furthermore, since the legal fiction of there even being such a thing as a *de facto* officer at all arises only by judicial fiat, and does not arise from, and is not mandated by, the Constitution, or any other body of law, it has hardly run contrary to the Constitution or to any other law for the Courts to have recognized, as they have done in the past, those circumstances when it would be appropriate for the judiciary not to extend its mantle of *de facto* officer status in order to shield a particular person who would otherwise be required to stand equal before the law as all others do.[16] And such should also be the case here now.

i.) If Only The Impeachment Clause Can Be Used To Remove A De Facto *Constitutional Officer From Office, Then The Supreme Court May Have Violated The Impeachment Clause*

If the result in *Barnett* holds true, we must ask whether the Supreme Court itself violated the Impeachment Clause in *Nguyen* by removing the *de facto* judge from a position which required the participation of a true Article III judge. For the Court ordered the Ninth Circuit to hear the appeal all over again without him.[17]

[15] See, Note 11, *supra*.
[16] *Ibid.*
[17] *Nguyen*, 539 U.S. at 77-81.

And the *de facto* judge in *Nguyen* did occupy the office in question, and did exercise the functions thereof. The Constitution, however, declares that judges shall hold their office during their "good behavior",[18] and therefore presumably can be removed only through the Impeachment process.

ii.) Applying The De Facto *Officer Doctrine To Shield Such An Officer From All Civil Actions To Test The Validity Of One's Claim To Office Would Violate* Marbury v. Madison

At issue in *Marbury* was whether that portion of the Federal Judiciary Act of 1789 which purported to grant to the Supreme Court original jurisdiction to issue a writ of mandamus was constitutional.[19] In discussing the background of this issue, the Supreme Court noted that by law, certain civil officers could not be dismissed by the President,[20] and that Mr. Marbury had a vested interest in such an office for a term of five years.[21] But the Supreme Court then also said,

> The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence [sic] had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority. *Marbury*, 5 U.S. (1 Cranch) at 167.

Thus, although the Court in *Marbury* did not mention the Impeachment Clause, the Court nonetheless made it clear that it would allow at least some civil

[18] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior …" U.S. Const., Art. III, § 1.
[19] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).
[20] *Marbury*, 5 U.S. (1 Cranch) at 162.
[21] *Marbury*, 5 U.S. (1 Cranch) at 167-168.

actions to determine the validity of someone's claim to hold an office from which the person could not be fired, *i.e.*, an office against which the Impeachment Clause ordinarily would operate; and furthermore, actually removing a *de facto* officer by judicial authority would not run specifically contrary to *Marbury*, either.

We ask this Court to consider that the Prayer for Relief in Hollister's original Complaint[22] and First Amended Complaint[23] sought various forms of judicial relief in the alternative of each other to protect him from facing court-martial or from multiple, conflicting claims even if the Court were to find that Soetoro is in fact constitutionally qualified to be President, and these judicial orders could operate to protect Hollister from potentially conflicting orders and claims from divisions within the chain of command above him which still might arise even if Soetoro is not removed from office. Accordingly, Hollister should still be allowed to adjudicate his claim to protect himself to whatever extent the law will allow, whether Soetoro is ultimately removed from office or not. As his Honor Judge J. Skelly Wright said for this Circuit,

> This Court has held that equity will not be barred from issuing an injunction to restrain invalidly appointed officers if the alternative remedy of *quo warranto* is inadequate. *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) (citation omitted).

[22] Complaint Prayer for Relief at E-G.
[23] First Amended Complaint, Prayer for Relief at E-G.

In the case at bar, *Quo Warranto* is, of course, inadequate because Hollister has no interest in the Office of President, and therefore *Quo Warranto* is unavailable. We also wish to note that the Supreme Court has recognized that even a *de jure* President, let alone a *de facto* President, is not generally immune from civil actions.[24]

2. Current Case Law Of The Supreme Court Would Not Prohibit The Use Of The Judicial Branch Against A De Facto *Officer*

If this Court does find that the Impeachment process is at least the principal means of removing even a *de facto* President from office, we submit that it is not necessarily the exclusive means of removing a *de facto* President, and that the judiciary can still have a role to play. On the separation of powers the Supreme Court has observed,

> True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others …," …. [but] the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).
>
> > "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence." Nixon v. Administrator of General Services*, 433 U.S. 425, 441-443 (1977) (citations

[24] *Clinton v. Jones*, 520 U.S. 681 (1997).

> omitted) (emphasis supplied by the Supreme Court in *Nixon*).

The Court then also said,

> Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,
>
> > "did not mean that these departments ought to have no *partial agency in*, or no *controul* [sic] over the acts of each other. His meaning, as his own words import …. can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original).
> >
> > Similarly, Mr. Justice Story wrote:
> >
> > "[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905). *Nixon*, 433 U.S. at 442, n. 5.

More recently, the Supreme Court has observed that the boundaries between the three branches of the federal government are not "hermetically" sealed,[25] and has also given the following guidance on point:

> [T]he Framers did not require---and indeed rejected---the notion that the three Branches must be entirely separate and distinct. *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citation omitted).

[25] *Miller v. French*, 530 U.S. 327, 341 (2000).

Writing for the Ninth Circuit *en banc*, before being elevated to the Supreme Court, his Honor Judge Anthony Kennedy noted two concerns as to whether a particular statute had compromised the integrity of the judiciary. One concern was,

> whether … Congress has invaded the power of a coordinate branch or permitted an improper abdication of that branch's central authority; the second is whether the requirement for entry of judgment improperly directs the judiciary in the performance of its duties.
>
> The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of the its essential role in the Constitutional system. *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc); *cert. den.* 469 U.S. 824.

As the Second Circuit has also observed,

> [C]ourts are to employ a "flexible understanding of separation of powers." In *Mistretta*, the Supreme Court …. directed courts to "up[hold] statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *United States v. Huerta*, 878 F.2d 89, 92 (2nd Cir. 1989) (citations omitted).

It being that current law recognizes that, in an appropriate case, the functions of the legislature and the judiciary can be intermingled, we submit that it would be inappropriate not to recognize a role for the judiciary to hear a party's claim that his rights may be affected by someone who unlawfully holds office, and to remove someone who unlawfully holds office on that basis.

a.) Removing A De Facto *President By* Quo Warranto *Or By Other Civil Actions Does Not Constitute Impeachment*

A comparison of the nature of Impeachment *viz a viz* a civil action to test the qualifications of someone to be President illustrates that each pertains to an entirely different type of interest than the other. Impeachment is in the nature of a criminal proceeding (specifically, an indictment, and a trial with conviction or acquittal). Civil actions to test the qualifications of someone to be President, by contrast, are no-fault in character. Impeachment is for "high crimes and misdemeanors".[26] By contrast, the only inquiry in a civil action is whether the person is qualified or not; under the modern rule, even with respect to *Quo Warranto*, there isn't even an inquiry as to whether any crime has been committed at all. Impeachment assumes that the person against whom the Impeachment proceeds is someone against whom Impeachment can proceed---*i.e.*, someone who unquestionably holds a particular office. Civil actions designed to test the person's qualifications to hold office, by contrast, place at issue the very question of that person's legitimate status as a holder of that office. Consequently, civil actions to test the qualifications of someone who may be only a *de facto* President do not constitute a usurpation of the power of Congress to impeach.

[26] The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S. Const., Art. II, § 4.

b.) Civil Actions To Test The Qualifications Of A De Facto *President Do Not Interfere With A Decision Of Congress To Impeach Or Not Impeach*

Nothing about a civil action to test someone's qualifications to hold office either requires Congress to carry out, or refrain from carrying out, the Impeachment process, nor does it place any pressure at all on Congress to impeach or to refrain from impeaching. Consequently, by the nature of things, civil actions designed to test someone's qualifications to be President do not encroach upon Congress' limited ability to intrude into the judicial function through its power to impeach or refrain from impeaching; and thus also, to borrow from the above quote from the Ninth Circuit in *Instromedix*, a civil action which tests the constitutional qualifications of someone to hold office is certainly not one which improperly directs the legislature in the performance of its duties under the Impeachment Clause.

Granted, removing a *de facto* President by civil action would render moot any issue of Impeachment. But this would be a problem for a *de facto* President only if a *de facto* President is someone who, contrary to the above-stated considerations,[27] is actually entitled to the protection of the Impeachment Clause, and this would be a problem for Congress only if the Constitution required that Impeachment be the only means of removing even a *de facto* President. However, the language of the Constitution, the language of *Marbury*, and the language of the

[27] See Argument I.A.(1)(a).

Supreme Court's case law on the separation of powers do not support or require such a result.

B. Hollister's Claim Pertains To An Ongoing Threat Of Harm

If this Court finds that Hollister may face an issue of mootness, there are three things to consider. First, adjudication on the merits in this case would operate to bind the parties for all time. Thus, even if this Court were to find that this case is moot with respect to the present term of office of Soetoro and Biden, the case at bar, on the face of the original Complaint and First Amended Complaint, would nonetheless operate against Soetoro and Biden with respect to any possible bid they might make for reelection in 2012. Although this involves speculation, we would remind the Court that both Interpleader and *Bivens* are for those cases in which the threat of harm is speculative every bit as much as they are for those cases in which the threat of harm is definite and immediate,[28] and this is particularly the case with respect to *Bivens* where the threat of harm may involve repetition of injury.[29] Significantly, Appellant Soetoro's presidential campaign remains active with the Federal Election Commission (FEC), with nearly $9

[28] Interpleader: See, *Underwriters at Lloyd's v. Nichols*, 363 F.2d 357, 364 (8th Cir. 1966); *American Fidelity Fire Ins. Co. v. Construcciones WERL, Inc.*, 407 F.Supp. 164, 173 (D.V.I. 1975); *State of Texas v. State of Florida*, 306 U.S. 398, 410-411 (1939). *Bivens*: See, *Farmer v. Brennan*, 511 U.S. 825, 830, 845-846 (1994).
[29] *Ibid.*

million on hand.[30] (Although certain other presidential campaigns remain active with the FEC, in those cases this apparently is, for the most part, in conformity with those campaigns' efforts to retire campaign debt or to stay active for possible future bids for the Presidency.)

Second, just exactly how speculative the threat of harm under Interpleader or *Bivens* is right now for Hollister with respect to the election of 2012 is something which must be considered in light of the practical ramifications of *Barnett*. For in light of how long it takes to adjudicate a question of whether someone is constitutionally qualified to be President or not---as is illustrated by the case at bar, and others---if one is allowed to have a claim heard only after the candidate in question has been elected, there won't be enough time to bring the case to final judgment until after that person has been sworn in. This fact, when combined with the possible application of *Barnett* against Hollister (or any other party) on the grounds that only the Impeachment Clause could then be used to remove the defendant from office, thereby making the case moot, could make a mockery of the very concept of judicial review for this type of case. And this potential threat of being shut out of Court would by itself increase the potential threat of injury which Hollister, or others, would face in Interpleader or *Bivens*.

[30] See, http://images.nictusa.com/cgi-bin/fecimg/?C00431445; see also, http://images.nictusa.com/pdf/230/29992941230/29992941230.pdf#navpanes=0

Third, even if the nature of either Interpleader or *Bivens* by itself is not enough to keep this case alive with respect to the election of 2012, the Supreme Court has allowed cases to proceed even though they would otherwise be deemed moot if they would present factual circumstances which would be "… capable of repetition, yet evading review."[31]

Fourth, the Supreme Court has said,

> When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness. *Sosna v. Iowa*, 419 U.S. 393, 402, n. 12 (1975) (citation omitted).

Whether a plaintiff faces a situation which, on the facts themselves, would truly be "capable of repetition, yet evading review" is something which would, after all, be an evidentiary matter, most properly suited for the District Court, not the Court of Appeals. And thus, at a minimum, this case should be remanded to the District Court for such a hearing.

II. Disposal Of A Case Without Holding A Hearing Contravenes Hovey v. Elliott

In *Hovey v. Elliott*,[32] defendants McDonald and White had been ordered by the trial court (the "supreme court of the District of Columbia") to deposit certain

[31] *Roe v. Wade*, 410 U.S. 113, 125 (1973). See also, *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).
[32] *Hovey v. Elliott*, 167 U.S. 409 (1897).

funds with the court in the amount of $49, 295.50.[33] The court also warned them that if they failed to do so, as a means of punishing them for contempt, the court would strike the answer they had filed in the case and adjudge the case as one in which no answer had been filed; they did not deposit the funds with the court, and the court struck their answer from the record, and entered judgment against them accordingly for the total amount claimed: $197, 190.00.[34] The Court of Appeals of New York refused to honor the judgment from the D.C. trial court on the grounds that the trial court had not the authority, in a contempt proceeding, to strike out the answer and to refuse to consider the testimony filed in the case. Review was sought for alleged failure to give "proper faith and credit" to the judgment of the D.C. trial court.[35] Significantly, the defendants apparently had never asked for a hearing; nonetheless, the U.S. Supreme Court deemed itself to be faced with the question of whether a court,

> … has the right to … strike [a party's] answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof, *and without a hearing*, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. *The fundamental conception of a court of justice is condemnation only after a hearing*. To say that courts have inherent power to deny all right to defend an action, and to render decrees *without any hearing whatever*, is, in the very nature of things, to convert the court exercising such an authority into an instrument of

[33] *Hovey*, 167 U.S. at 411.
[34] *Hovey*, 167 U.S. at 411-412.
[35] *Hovey*, 167 U.S. at 412-413.

wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. *Hovey*, 167 U.S. at 413-414 (emphasis supplied).

The Court then quoted from one of its previous cases:

> "The order, *in effect*, denied the respondent a hearing. …. A different result [other than overruling such a thing] would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice." *Hovey*, 167 U.S. at 414 (citation omitted) (emphasis supplied).

The Court then quoted from yet another case it had decided:

> "The principle, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party *without hearing him, or giving him an opportunity to be heard*, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> **********
>
> "In the present case, the district court not only, in effect, said ['you shall not be heard'], but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation. It was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. At common law no man was condemned *without*

> *being afforded opportunity to be heard*. *Hovey*, 167 U.S. at 414-415 (citation omitted) (emphasis supplied).

III. The Law Of The Military Jurisdiction Increases Uncertainty Over What Is Lawful And What Is Unlawful

The law of the military jurisdiction offers too little guidance for a member of the Armed Forces who is reactivated. The governing case in the military jurisdiction on the duty to obey lawful orders and to disobey at least certain unlawful orders[36] is *United States v. New*[37] (involving the same Army Specialist who was the plaintiff in *New v. Perry,*[38] *affd. sub nom. New v. Cohen*).[39] Hollister referred the District Court to *United States v. New* in his original Complaint (¶ 36) and in his First Amended Complaint (¶ 42). Under the reasoning of the Court of Appeals of the Armed Forces (CAAF) in *United States v. New*, a member of the Armed Forces must base the conclusion that the member is obligated to disobey an illegal order on the basis of the member's own perception of the illegality of the order, notwithstanding the fact that the Court said that it was proclaiming the very opposite. The Court said,

> It is not a defense for appellant to claim that the order is illegal based on his interpretation of applicable law. An order is presumed to be lawful and the defense has the burden to prove illegality unless the

[36] See, *e.g.*, *United States v. Calley*, 22 USCMA 534, 48 CMR 19 (1973) (recognizing a duty to disobey unlawful orders).
[37] *United States v. New*, 55 M.J. 95 (2001); *cert. den.* 534 U.S. 955.
[38] *United States ex rel. New v. Perry*, 919 F. Supp. 491 (D.D.C. 1996).
[39] *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997); *cert. den.* 523 U.S. 1048.

> order is "palpably illegal on its face." *New*, 55 M.J. at 108 (citations omitted).

The Court thus contradicted itself from one sentence to the next. To see this, let us first consider the second of those two sentences, in which the Court deals with the ordinary state of affairs. That sentence envisions a scenario in which, as noted above, a servicemember enters into a legal duty to obey lawful orders, and also a legal duty to disobey an order on the grounds of its illegality, though only if (according to the Court) the order is one which is "palpably illegal on its face". There is, however, no way for a servicemember to discern what constitutes an order that is "palpably illegal on its face" except, of course, by reference to the servicemember's interpretation of applicable law, which is precisely what the Court expressly forbids in the first sentence. Thus, the Court gives a servicemember an inherently contradictory standard by which to try to know what actions the law requires and which ones the law forbids.

How could Hollister apply this "standard" established by the Court? How could his superior officers in his chain of command apply this "standard"? Let us say, for instance, that some time from now, someone comes forward with evidence which clearly establishes that Soetoro's occupation of the Office of President is "palpably illegal on its face". Let us also say that, subsequent to that, and while still occupying the Office of President, Soetoro issues an order which ordinarily would be legal. If Soetoro's claim to the Presidency is palpably illegal on its face,

does that make an order which is otherwise legal an order which is palpably illegal?

This once again implicates *Nguyen v. United States*.[40] Prior to *Nguyen*, one might have said that the illegality of the *de facto* officer's being in office would not compromise the legality of one of the officer's official acts. Following *Nguyen*, the answer is less clear. This emphasizes the uncertainty any member of the Armed Forces could face, and the need for judicial resolution of his question as to who is presently lawfully entitled to be Commander-In-Chief.

Also, significantly, even though the *de facto* officer doctrine usually shields someone who relied on the apparent authority of the *de facto* officer to act, this rule has been found to have no application where a person knew that the act was not that of a legal officer.[41] What would be the case, then, if Soetoro were to admit later on, in the face of overwhelming evidence, that he is not now a natural-born citizen (if he ever was one), and if he then asked the American people to allow him to continue in office anyway? What would be the practical ramifications of that admission for a member of the Armed Forces when it comes to life-and-death decisions, to obeying orders of superiors and giving orders to subordinates, and to the use of the nation's military arsenal and personnel?

[40] *Nguyen v. United States*, 539 U.S. 69 (2003).
[41] See, Am.Jur.2d, *Public Officers* § 243.

IV. The Intangible Nature Of Hollister's Property Should Be Considered In Light Of The Fact That Property Is Always Intangible.

As we all learned in first year law school, property does not consist of a tangible thing itself, but rather consists of our intangible bundle of rights in such things. As has been said,

> [I]n law, it is not the physical material object which constitutes property …
> The physical objects, although the subjects of property, are, when coupled with possession, only the indicia, the visible manifestations of invisible rights.[42]

That being the case, why would it come as any surprise that the use of the word "Property", when not qualified by any use-specific meaning, would include property rights in an intangible *res?*

V. The Law Of Quo Warranto *Recognizes That Hollister Has A Property-Type Interest In His Office*

With respect to *Quo Warranto* generally, if someone were to allege that Hollister had mistakenly been given the office of Colonel when it should have been given to another, an action in *Quo Warranto* could potentially lie against Hollister himself for the right to that office. Significantly, as Judge Wright said for this Circuit itself,[43] the way *Quo Warranto* was developed, whoever could claim true entitlement to the office was deemed to have some property interest in the office,

[42] Corpus Juris Secundum, *Property* § 4(b).
[43] *Andrade*, 729 F.2d at 1498.

and *Quo Warranto* was originally thought of as being, in essence, a test of these rights of both claimants, and an action in Ouster or Ejectment against the alleged usurper.[44] Although this was originally limited to the King,[45] under the modern rule, it can also be brought by someone with a personal interest in the office that is superior to the personal interest of the incumbent.[46] It would be odd, then, if not duplicitous, if the law were to recognize on the one hand that Hollister has what is at least a property-type interest in holding his office of being a Colonel in the Individual Ready Reserve at present, and that he would have at least a present-tense property-type interest in his office of being an active duty Colonel if he is reactivated, and yet at the same time have the law also deny that he has any property interest or property-based duties concerning that same office, and the things pertaining thereto, when he brings Interpleader.

VI. The Threat Of Seeking Attorney's Fees By Counsel For Soetoro And Biden Illustrates The Risk To The First Amendment In The Case At Bar

In his Original Reply Brief, Hollister brought to this Court's attention the point that allowing a Reprimand to stand in a case like this would implicate prior restraint of Free Speech under the First Amendment.[47] We wish to augment that

[44] See, Am.Jur.2d, *Quo Warranto* §§ 2 and 24; see also, Corpus Juris Secundum, *Quo Warranto* § 7.
[45] *Ibid.* See also, *Ames v. State of Kansas*, 111 U.S. 449, 460-461 (1884).
[46] See, Corpus Juris Secundum, *Quo Warranto* § 14; see also, Am.Jur.2d, *Quo Warranto* § 2.
[47] Original Reply Brief of Hollister at 9-11.

point by bringing to this Court's attention the fact that, right after the appeal in this case was docketed, counsel for Soetoro and Biden then sent John Hemenway a letter threatening to seek attorney's fees if Hemenway continued to pursue this appeal.[48] This is a perfect example of the type of intimidating effect on Free Speech to which Hollister was referring, and it emphasizes the importance of a statement of the U.S. Supreme Court to which Hollister referred in a footnote in his Original Reply Brief:[49]

> Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. This Court, above all, should uphold the principle of open access. *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067, 1070-71 (1985).

VII. <u>This Court Should Reach The Merits Of The Claim Itself</u>

In considering the Reprimand against John Hemenway himself, we respectfully ask this honorable Court to reach the merits of the underlying issue of whether Hollister well-pleaded a claim upon which relief can be granted under Interpleader or *Bivens*, if at all possible. Doing so, and pointing out the error of the

[48] See Attachment Two of Motion to File Brief.
[49] Original Reply Brief of Hollister at 10, n. 13.

District Court in any fashion, if this Court should find error, will help prevent potential substantial injustice to this Court's *amici*, and harm to their reputations as well. It is also the case that if this Court finds no error, it would be helpful to this Court's *amici*, and to any parties in future, related litigation (including possibly, of course, the current Appellees), if there was appellate level authority explaining how it is that there is no error, so that all might have a better understanding of this type of case.

Conclusion

The judgment of the District Court should be reversed, and this case should be remanded with instructions to vacate the Reprimand of Hemenway and for expedited Discovery for Hollister or, in the alternative, for such hearings as this Court may deem proper.

Respectfully submitted,

Dated: November 27, 2009

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CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to Fed. R. App. P. 32(a) and D.C. Circuit Rule 32(a), I hereby certify that this corrected brief contains 6,998 words, excluding the parts exempted by the rules, and has been prepared ina proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point typeface.

Dated: November 27, 2009

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U.S. District Court
for the District of Columbia Case No. 1:08-cv-02254 JR

Court of Appeals Case No. 09-5080
Consolidating No. 09-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

——————— O ———————

GREGORY S. HOLLISTER,

Plaintiff – Appellant,

v.

BARRY SOETORO, et al,

Respondents – Appellee.

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CERTIFICATE OF SERVICE

I, Lawrence J. Joyce, Esquire, hereby certify that the Corrected Brief Amicus Curiae of Lawrence J. Joyce, Esquire and Philip J. Berg, Esquire was served via email this 27th day of November, 2009 upon the following:

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