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**MEMORANDUM**

**Subject** Qualifications for the Office of President of the United States and Legal Challenges to the Eligibility of a Candidate

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**This memorandum was prepared to enable distribution to more than one congressional office.**

This memorandum addresses inquiries from congressional offices regarding the constitutional qualifications for the office of President of the United States, and the issue of challenges concerning specifically the questioning of President Obama's "natural born citizenship" status.<sup>1</sup> Many of the inquiries have questioned why then-Senator, and now President, Obama has not had to produce an original, so-called "long" version of a "birth certificate" from the State of Hawaii, how federal candidates are "vetted" for qualifications generally, and have asked for an assessment of the various allegations and claims of non-eligibility status.

Concerning the production or release of an original birth certificate, it should be noted that there is no federal law, regulation, rule, guideline, or requirement that a candidate for federal office produce his or her original birth certificate, or a certified copy of the record of live birth, to any official of the United States Government; nor is there a requirement for federal candidates to publicly release such personal record or documentation.<sup>2</sup> Furthermore, there is no specific federal agency or office that "vets" candidates for federal office as to qualifications or eligibility prior to election.<sup>3</sup>

The mechanics of elections of federal officials within the several states are administered under state law.<sup>4</sup> The quadrennial presidential election, although required since 1845 to be held on the same day in each

<sup>1</sup> The standing qualifications to be President of the United States, at Article II, Section 1, clause 5, of the Constitution provide that one must be at least 35 years old, a resident "within the United States" for 14 years, and a "natural born Citizen."

<sup>2</sup> In addition to the "natural born Citizen" requirement for President, a United States Senator must be a "citizen" of the United States for nine years (Art. I, Sec. 3, cl. 3), and a United States Representative must be a "citizen" for seven years (Art. I, Sec. 2, cl. 2). No general requirement exists for candidates to the United States Senate or House of Representatives to produce an original, or a certified copy of a birth certificate.

<sup>3</sup> The Federal Election Commission is authorized by law to administer and seek compliance with the *campaign finance* provisions of federal law for candidates to federal office, and to administer and seek compliance with the provisions for public financing of the nomination and election of candidates for President, but has no duties or responsibilities with respect to judging or vetting qualifications or eligibility of candidates to federal office. 2 U.S.C. § 437c.

<sup>4</sup> Article II, Section 1, cl. 2, delegates authority to the state legislatures to direct the manner of appointment of electors for President; and Article I, Section 4, cl. 1, delegates to the state legislatures the initial authority for the "Times, Places and Manner" of elections to Congress, with a residual authority in Congress to make such regulations.

state<sup>5</sup> is, in an administrative and operational sense, fifty-one separate elections in the states and the District of Columbia for presidential electors. States generally control, within the applicable constitutional parameters, the administrative issues, questions, and mechanisms of ballot placement and ballot access.<sup>6</sup>

State election officials under some state ballot laws might thus require candidate "statements" or "declarations" of candidacy attesting to and/or certifying certain facts as a condition to be on the ballot; in other states, representatives of the established political parties may certify names to the Secretary of State, or the designated elections official may place viable or "recognized" candidates on the presidential preference ballots.<sup>7</sup> In such cases, opposing political candidates or political parties may have "standing" to legally challenge the placement of a name of an opponent on the ballot,<sup>8</sup> or state law may specifically provide for a procedure for timely protests to be filed concerning the qualifications of candidates.<sup>9</sup> Additionally, the relevant election official in the state, such as the Secretary of State, may have authority to exercise *discretion* to challenge a self-certification or a certification by a political party of a candidate whom the election official believes is not eligible for the office. It would appear to be a matter of state law and interpretation as to whether election officials in a particular state have discretionary authority to question the certification of a party's nominated candidate, or even a self-certification of a candidate, if such election officials were presented with actual probative, documentary evidence to rebut any presumed or self-certified eligibility. In *Keyes v. Bowen*, the California Supreme Court dismissed a suit against the Secretary of State which challenged President Obama's eligibility and the California electoral votes for him, finding that: "Petitioners have not identified any authority requiring the Secretary of State to make an inquiry into or demand detailed proof of citizenship from Presidential candidates," and thus mandamus (a writ of mandate) was not granted.<sup>10</sup> However, although no "ministerial duty" or mandatory requirement exists to support a mandamus action, there may still exist *discretionary* authority in such elections official.<sup>11</sup>

Several citizen law suits filed in 2008 challenging the eligibility of one or both of the major party candidates for President were dismissed because of the lack of legal "standing" of the plaintiff. Article III, Section 2, of the Constitution provides that jurisdiction of the federal courts extends only to "cases" and "controversies," and this jurisdictional limitation is interpreted to mean that the litigant bringing a case must have an actual *injury* which is real or concrete, as opposed to theoretical or hypothetical, and which is also discrete or particularized to that individual or group, rather than overly generalized.<sup>12</sup> The

<sup>5</sup> 5 Stat. 721, Ch. 1, January 23, 1845; see now 3 U.S.C. § 1.

<sup>6</sup> *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Lubin v. Panish*, 415 U.S. 709, 719 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

<sup>7</sup> See, e.g., Senate Rules and Administration Committee, *Nomination and Election of the President and Vice President of the United States*, 2000, S. Doc. 106-16 (January 2000).

<sup>8</sup> *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 585-588 (5<sup>th</sup> Cir. 2006), *Application for Stay to Supreme Court, denied*, No. 06-A-139 (2006), regarding ballot placement of a "substitute" *opposition* candidate under state law, and the constitutional "eligibility" of the original candidate; see also *Fulani v. Hogselt*, 917 F.2d 1028, 1030 (7<sup>th</sup> Cir. 1990), finding standing of opposition party to challenge ballot placement of opposing candidates; *Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994) (discussion of "competitors" standing" in a political context).

<sup>9</sup> Note, e.g., Ohio Revised Code, § 3513.05 (formerly Ohio Gen. Code § 4785-70), and *McGowan v. Board of Elections*, 105 N.E.2d 639 (Ohio 1952), appeal of voter protest of citizenship qualification in statement of candidacy of a federal candidate.

<sup>10</sup> *Keyes v. Bowen*, Case No. 34-2008-80000096-CU-WM-GDS, Slip op. at 2 (Sup. Ct. Cal. March 13, 2009). Emphasis added.

<sup>11</sup> See, for example, unreported case of *Cleaver v. Jordan*, Case no. 7838 (Calif. Supreme Court minutes, Sep. 26, 1968), *cert. denied*, 393 U.S. 810 (1968), where California court reportedly upheld discretionary authority of Secretary of State not to list ineligible candidate for President on the ballot; and *Jenness v. Brown*, also unreported, case no. civil 72-204 (S.D. Ohio Sep. 27, 1972), concerning ballot placement of an ineligible candidate in Ohio.

<sup>12</sup> *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83 (1968); *Valley Forge Christian College v. Americans United* (continued...)