

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

- 1.) PHILIP J. BERG, ESQUIRE in *pro se*
On his own behalf and as RELATOR on behalf
Of the GOVERNMENT OF THE UNITED STATES
[Hereinafter at times “Appellant”]
Plaintiff – Appellant
- 2.) BARACK HUSSEIN OBAMA
[Hereinafter at times “Obama”]
Defendant
- 3.) UNITED STATES ATTORNEY’S OFFICE and
UNITED STATES DEPARTMENT OF JUSTICE
[Hereinafter at times “The Government”]
Respondents – Appellees

B. Ruling Under Review

The ruling at issue for purpose of the instant Petition for *Rehearing en banc* is the Panel’s Order of June 30, 2010 finding that Appellant failed to demonstrate that Eric Holder, the United States Attorney General; the Office of the United States Attorney General and the Department of Justice have a Conflict-of-Interest with prosecuting the matter against our now sitting President.

The rulings at issue on the merits of this appeal are the United States District Court for the District of Columbia, Case No. 08-cv-01933 RWR. Federal Supplement Citation for this Case is Berg v. Obama, 656 F. Supp. 2d 107 (D.D.C. 2009) Order of June 9, 2009 (Dismissing the Case); September 21, 2009 (Memorandum and Order Denying Relator's Motion for Reconsideration); and September 21, 2009 (Final Order Denying Relator's Motion for Reconsideration).

C. Related Cases

To Counsel's knowledge there are no other related cases or proceedings pending in this Court or any other Court pertaining to the Appellant and his *Qui Tam* (False Claims) Action.

Respectfully submitted,

Dated: July 14, 2010

s/ Philip J. Berg

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*Appellant in Pro Se and as Relator on
behalf of the Government of the
United States*

STATEMENT OF THE ISSUE AND ITS IMPORTANCE

This *Qui Tam* case based on the False Claims Act (hereinafter at times “FCA”) is a unique case with unique circumstances because of the nature of the False Claims, that being because the allegations of fraud herewith are against now sitting President Barack Hussein Obama. The claims are based upon the fact Obama fraudulently held the Office of United States Senator from Illinois and the fact that review of these proceedings to decide to prosecute rests with the United States Attorney General Eric Holder and as set forth hereinafter, a Conflict-of-Interest exists for which a Special Prosecutor must be appointed to review the evidence in the False Claims Act case and make a proper decision whether to prosecute or not.

The United States Attorney General, Eric Holder, reports directly to the alleged violator, President Obama; gives opinions and legal advice to the alleged violator, President Obama; was senior legal advisor to Barack Hussein Obama’s Presidential Campaign; and served as one of three [3] members on then President-Elect Obama’s Vice-Presidential Selection Committee and thus a major Conflict-of-Interest existed and still exists with the within litigation.

As a result, the United States Attorney General Eric Holder and his staff, which includes the U.S. Department of Justice had and have a clear Conflict-of-Interest.

If this does not rise to the level of a Conflict-of-Interest codified as 5 CFR § 2635, et sequitur; 5 U.S.C. § 2640, et sequitur; 18 U.S.C. §205; and 18 U.S.C. §208 then the Code of Federal Regulations and 18 U.S.C. §205; and 18 U.S.C. §208 should be removed from our laws.

Allowing this Conflict-of-Interest continue is opening the door for other governmental agencies to disregard these very laws put in place to ensure fair justice.

PETITION FOR EN BANC REVIEW

On June 30, 2010, Judges Rogers, Garland and Brown issued an Order finding Appellant failed to demonstrate that Eric Holder, the United States Attorney General, the Office of the United States Attorney General and the Department of Justice have a Conflict-of-Interest in representing the President of the United States in a Qui Tam (False Claims Act) action. *See EXHIBIT “1”* attached hereto.

This Order of June 30, 2010 concerns an issue of exceptional importance as it conflicts with the Code of Federal Regulations (hereinafter at times C.F.R.) appearing as 5 CFR § 2635, et sequitur; 5 U.S.C. § 2640, et

sequitur and criminal statutes outlined in 18 U.S.C. §205 and 18 U.S.C. §208.

Pursuant to Federal Rules of Appellate Procedure 35(a); 35(b); and 40, Petitioner-Appellant (“Appellant”) requests expedited *en banc* review.

In the case of Strickland v. Washington, 466 U.S. 668 (1984) the United States Supreme Court found in Conflict-of-Interest cases, prejudice is presumed "if the party demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer's performance.'" Id. at 692 (quoting Cuyler v. Sullivan, 466 U.S. at 350, 348).

In the instant case, Appellant pointed out his *Qui Tam* based on the False Claims Act (hereinafter at times “FCA”) is a unique case with unique circumstances because of the nature of the False Claims, that being because the allegations of fraud herewith are against now, sitting President Barack Hussein Obama. The fact that review of these proceedings to decide to prosecute rests with the United States Attorney General Eric Holder; his office and the offices in which he is the head. The United States Attorney General, Eric Holder, reports directly to the alleged violator, President Obama; gives opinions and legal advice to the alleged violator, President Obama; was senior legal advisor to Barack Hussein Obama’s Presidential

Campaign; and served as one of three [3] members on President-Elect Obama's Vice-Presidential Selection Committee and thus a major Conflict-of-Interest existed and still exists with the within litigation.

For all the reasons explained herein, it is incumbent upon this Court to uphold the Code of Federal Regulations, grant Appellant's rehearing *en banc*; remand this case back to the lower Court with instructions to Appoint a Special Prosecutor to review the evidence in the False Claims Act case and make a proper decision whether to prosecute or not.

The conflicts dealt with by the several provisions are, in each instance, conflicts between public responsibilities and private interests. All of the statutory provisions are found in Chapter 11 (Bribery, Graft and Conflicts-of-Interest) of Title 18 of the United States Code, the Federal Criminal Code.

There are statutory restrictions on Conflicts-of-Interest during Government Service. Although there are four [4] statutory provisions regarding conflicts between governmental responsibilities and private interests of government employees, all of which apply to employees of the District of Columbia as well as the federal government, two [2] of which apply in this case and are as follows:

- A prohibition on certain representational activities relating to claims against and other matters affecting the government, 18 USC § 205.
- A prohibition on certain acts by government employees affecting a personal financial interest -- applying, inter alia, to negotiations for post-government employment, 18 USC § 208.

5 CFR § 2635.101 states in pertinent part, “(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations. (c) *Related statutes.* In addition to the standards of ethical conduct set forth in this part, there are conflict of interest statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. §§ 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to

them generally or as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely upon any description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

5 CFR § 2635.502 states in pertinent parts,

“(a)...where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter...” just as it appears herein.

(b) *Definitions.* For purposes of this section: participate in a particular matter...(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”

5 U.S.C. § 2640.103 “Prohibition” states:

“(a) *Statutory prohibition.* Unless permitted by 18 U.S.C. 208(b) (1)–(4), an employee is prohibited by 18 U.S.C. 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The restrictions of 18 U.S.C. 208 are described more fully in 5 CFR 2635.401 and 2635.402.”

Eric Holder joined President Obama's Presidential Campaign as senior legal advisor and also served as one of three [3] members on President-Elect Obama's Vice-Presidential Selection Committee. In December 2008, then President-Elect Obama asked Eric Holder to serve in his Cabinet as the United States Attorney General.

Mr. Holder was appointed by President Obama and now serves as the United States Attorney General whom is the head of the United States Department of Justice and United States Attorney General's Office. Eric Holder is paid by the United States Government and reports directly to "President" Obama. Eric Holder has a direct financial interest in that he draws a salary based on his position as United States Attorney General.

Furthermore, the conflict goes beyond financial. The United States Attorney General is the Chief Law enforcement officer of the Federal Government and represents the United States in legal matters and gives advice and opinions to the President of the United States, whom is the alleged violator herein.

If United States Attorney General Eric Holder, his staff and Office, including the United States Department of Justice are not conflicted out, then justice will never be served. If Mr. Holder allows the action to go forward, he is at great risk of losing his position, which is a financial

interest, as he would lose his government pay. United States Attorney General Holder is aware of this and for this reason will never allow a *qui tam* action which bears the name Barack Hussein Obama to go forward. Any involvement by United States Attorney General Eric Holder and/or any of his staff which he over-sees in this *qui tam* case are clear violations of the Code of Federal Regulations and the United States Codes.

If this Court grants the requested relief, absolutely no harm will come to the public, and certainly no irreparable harm to the Government. Instead, the public would have more confidence that our laws are being upheld.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant a rehearing *en banc*.

Respectfully submitted,

Dated: July 14, 2010

s/ Philip J. Berg

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*Appellant in Pro Se and as Relator on
behalf of the Government of the
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EXHIBIT “1”

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5362

September Term 2009

1:08-cv-01933-RWR

Filed On: June 30, 2010

Philip J. Berg, Esquire, on his Behalf and on
Behalf of the Government of the United States
of America,

Appellant

v.

Barack Hussein Obama and United States of
America,

Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BEFORE: Rogers, Garland, and Brown, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's orders filed June 9, 2009, and September 21, 2009, be affirmed. The district court properly dismissed appellant's qui tam action. 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). Appellant has not shown that he is entitled to discovery of the information the Department of Justice used in deciding to dismiss his qui tam action. See Swift, 318 F.3d at 254 ("[A] party is not entitled to discovery of information relating to prosecutorial decisions absent a substantial threshold showing.") (citing United States v. Armstrong, 517 U.S. 456, 463 (1996)). Nor has appellant demonstrated that the Department of Justice and the Attorney General have a conflict of interest because the case involves claims against the President.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5362

September Term 2009

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

CERTIFICATE OF SERVICE

I, Philip J. Berg, Esquire hereby certify that Appellant's Petition for Rehearing *en banc* was served upon the Government via electronic filing on the ECF system, this 14th day of July 2010, upon the following:

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