Comment On The Comments

WHO IS, AND IS NOT, A NATURAL BORN CITIZEN?

by [Joseph DeMaio](), ©2019

Article II, Section 1, clause 5 of the U.S. Constitution requires the president to be a "natural born Citizen"

(Aug. 5, 2019) — Your faithful servant's recent post here – raising the question of whether Mr. Andrew Yang is eligible to the presidency as potentially failing the "natural born Citizen" criterion of Art. 2, § 1, Cl. 5 of the Constitution – elicited some insightful and interesting reader comments. While normally, a response to a "comment" is usually another "comment," the quality of the comments (thus far posted) from "Thinkwell," "Bob68," "Robert Laity" and "Ed Sunderland" presents the opportunity for a formal post commenting on the comments…, if you will forgive the clumsy redundancies.

At the outset, each of the noted comments is clearly the product of folks who are conversant with the "eligibility" issue and the consequences of ignoring the Founders' original intent in drafting Art. 2, § 1, Cl. 5 of the Constitution. Stated otherwise, the commenters do not appear to be Obots.

Second, responding to the comments thus far made, each one has its merits. But in your humble servant's opinion, the common underlying thread throughout all of them is that the question of one's constitutional presidential eligibility still needs to be addressed and

unambiguously answered by the United States Supreme Court in a live "case or controversy." The likelihood of a 9-0 decision, of course, would be remote given the present makeup of the Court. Still, even a 5-4 decision would go a long way toward answering (if not settling) the continuing debate.

Third, and respectfully, in your humble servant's view, reliance on *Minor v. Happersett*, 88 U.S. 162 (1875) and its predecessors (*e.g.*, *The Venus*; *Shanks v. Dupont*; *etc*.) for the proposition that the Court has already "held" that which each commenter above-noted believes to be true, *i.e.,* that § 212 of Emmerich deVattel's *The Law of Nations* controlled the Founders' intent in drafting Art 2, § 1, Cl. 5, is not absolutely controlling.

While appealing, the argument that *Minor* settles the question for presidential eligibility purposes overlooks the fact that the actual "*holding*" in *Minor* was that the Missouri Constitution limiting the franchise to male citizens – thereby denying it to females – did *not* violate the 14th Amendment to the U.S. Constitution. That "holding" was the reason why, 45 years after the decision was rendered, the 19th Amendment abrogated (not "overruled," which only the Court can do) the decision and with it, its "holding," not only as to Missouri, but nationwide.

Whether or not the Court's oft-quoted "… but never as to the first…" statement (*see* 88 U.S. 162, 167-168 (1875)) could be deemed to be a secondary "holding" or instead was "dictum" is another question. But the mere existence of that remaining "holding or dictum" question undermines the argument that *Minor* is dispositive on the presidential eligibility issue.

Given the continuing confusion and debate over the meaning of the Constitution's eligibility clause, engendered in no small measure by the Congressional Research Service, resolution of this issue should be one of the Court's primary objectives. This would be particularly true if any one of the three (so far) potentially ineligible Democrat candidates for the presidency becomes the actual nominee.

While your faithful servant agrees with Mr. Laity that the filing of a fraudulent election form by a candidate or the candidate's agent would be a crime under 18 U.S.C. § 1001, it would still remain for the DOJ and/or an Attorney General to indict, prosecute and leave the decision up to a jury (assuming that no "plea deal" intervened), which jury might (or might not) convict.

Recall that the 6th Amendment to the Constitution guarantees an "impartial jury," with case law confirming that the jury is to be composed of the defendant's "peers." Raise your hand if you think that a federal jury empaneled in San Francisco, Sacramento or Washington, D.C. would have convicted – by unanimous vote required in a criminal case – Nancy Pelosi or Barack Obama of fraud under 18 U.S.C. § 1001 even if an indictment had been handed down. The uncertainty of that potential would only perpetuate the argument.

Mr. (or Ms.) Thinkwell's 8/4/19 7:15 AM comment raises the interesting question of whether the States have the authority to "remove ineligible candidates from their

ballots." Against the backdrop of the nonexistence of an absolutely controlling U.S. Supreme Court decision directly on point defining who is – and of greater importance, who is not – a "natural born Citizen," Thinkwell's question presents a quandary.

Specifically, if Thinkwell is correct about States "removing" ineligible candidates from their ballots, the inverse must also be true: One state might determine candidate "KH" or "TG" or "AY" to be ineligible while another might hold those same candidates eligible. The potential for endless litigation would be the lawyers' fantasy dream, especially at Perkins Coie. Thinkwell is likely correct, in your humble servant's view, that the Constitution only provides that the candidate who wins the general election in the immediately preceding November – and assuming the Electoral College casts the required 270 votes for the candidate the following January – is "eligible" to be sworn in and *serve* as president.

The "Catch-22" here is that, as Alan Keyes learned in *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), *cert. denied sub nom. Keyes v. Obama*, 567 U.S. 906 (2012), unless something is done to prevent the candidate who "won" the election in the preceding November and secured the necessary 270 Electoral College votes from being sworn in as president *before* he/she is so sworn in, the issue could be rendered "moot" as depriving the "injured candidate" of the requisite "standing" to maintain the case.

Stated otherwise, it is like trying to take action after the "horses have left the barn." This is the gimmick used by the Ninth Circuit to dismiss the complaint in *Drake v. Obama.* And while impeachment of an ineligible candidate after he/she has been sworn in as "president" might be available, that, too, is uncertain. Witness the convulsions that are gripping and paralyzing the Democrats and Nancy Pelosi in the House of Representatives even today.

Long story short: it would appear that the best chance for getting a live "case or controversy" in the courts and in front of the U.S. Supreme Court in time to have any effect would be for a candidate with "standing" to challenge the eligibility *bona fides* of the ultimate Democrat nominee – say, Kamala Harris; Tulsi Gabbard; or Andrew Yang – *prior* to the November 2020 general election, to step up, take note and prepare to take action. If the ultimate nominee were someone with clear eligibility *bona fides* (*e.g.,* Biden), that avenue might be foreclosed. However, if one of the candidates of questionable eligibility ended up being the ultimate Democrat nominee, the cause of action would be "ripe" for adjudication and immediate action would become necessary.

At the time this post is composed, the Democrat nominating convention is scheduled to take place in Milwaukee, Wisconsin July 13-16, 2020, which is now less than one year away. Right now, the field of those candidates seemingly possessed of the requisite "standing" appears to be limited to (a) any of the Democrat "finalist" *losers* (no pun intended… OK…, OK…, maybe a little bit intended…) to the ultimate Democrat nominee…, fat chance…, do not hold your breath; or (b) President Trump. Time is running out.

Got any better ideas? Let the intrepid P&E Editor know.