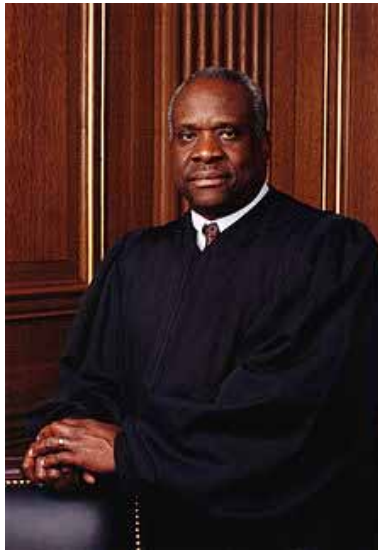


Open Letter to Justice Clarence Thomas

"A DECISION ON THE MERITS"

by [Joseph DeMaio](#), ©2021

May 23, 2021



U.S. Supreme Court Associate Justice Clarence Thomas

Dear Justice Thomas:

With respect, it is virtually certain that in the next Court conference – this coming Thursday, May 27, 2021 – the matter in Docket No. 20-1503, “Laity v. Harris” will be addressed. Further, it is also not altogether unlikely that, based on existing Court precedent, and as has happened in past cases involving the same plaintiff/petitioner – Mr. Robert Laity – his challenge to the constitutional eligibility of Vice-President Kamala Harris as a “natural born Citizen” may be denied on the grounds that he lacks the “requisite standing” to maintain and support his *certiorari* petition, arguments to the contrary notwithstanding.

This conclusion is not posited to advocate or suggest either a granting or denial of the petition, but merely to acknowledge the reality that based on precedent, the Court may deny the petition. Indeed, you may well concur in a determination that the petition be denied for lack of requisite standing under the Court’s existing precedent, including [Lujan v. Defenders of Wildlife](#), 504 U.S. 555 (1992).

With utmost respect, Mr. Justice Thomas, the issue of presidential eligibility as a “natural born Citizen” under Art. 2, § 1, Cl. 5 of the Constitution is not an insignificant one. Instead, it goes to the very core of who the Founders intended would be entrusted with command over the “[A]merican army” and be mandated to “[take care](#) that the laws be faithfully executed.” These directives would seem to be at least as important as those

regarding, for example, whether individuals seeking redress for alleged and perceived environmental habitat and endangered species damage resulting from events in Egypt and Sri Lanka possessed “standing,” as encountered in *Lujan*.

While requisite standing was found lacking in *Lujan* – a conclusion in which you concurred with Justice Scalia – at least the matter was granted review on the petition for *certiorari*. And yet, in virtually every case seeking to question or challenge the constitutional “natural born Citizen” *bona fides* of persons including Barack Hussein Obama, Jr., John McCain and now, Vice President Harris, a ruling on the merits by the Court has been avoided or “evaded” on the grounds that the challenger lacked standing, resulting in a peremptory denial of *certiorari*.

In this regard, you will no doubt recall your [remarks](#) made April 15, 2010 to the House Appropriations Subcommittee on Financial Services and General Government. Subcommittee Chair Rep. José Serrano (D-NY.) asked you a question, but admitted that he was not a judge, which elicited your response that he “did not have to be born in the United States.” The Chairman then quipped: “So you haven’t answered the one about whether I can serve as president, but you answer this one?” Your response: “We’re evading that one... we’re giving you another option.”

Following the last election, but prior to the Electoral College gathering to count and certify the results, it was suggested [here](#) that Vice President Pence could have taken action long ago to have the question brought before the Court. As the then-sitting Vice President, he would seemingly have had the “particularized injury in fact” – at least after Nov. 3, 2020 – to have satisfied the Court’s “requisite standing” rulings. He of course did not do that.



Thus, the question remains unanswered and therefore unresolved by any decision of this Court. Those who rely on the 14th Amendment and the decision interpreting that amendment in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) to conclude that a “citizen at birth” or a “citizen by birth” under the amendment, regardless of parental citizenship, is the constitutional equivalent of a “natural born Citizen” as contemplated by the Founders in Art. 2, § 1, Cl. 5, have thus far largely succeeded in preventing any contrary views from being given serious analysis. Consequently, by default, the issue has been relegated to the opinions and pontifications of law school professors, law review

articles and “products” of the Congressional Research Service..., but not the United States Supreme Court.

Moreover, those who rely on this Court’s decision in, for example, *Minor v. Happersett*, 88 U.S. 162 (1875), *abrogated by the 19th Amendment* (1920) for its statement (88 U.S. at 167-168) that the Founders never doubted that a “natural born citizen” was a person born here to two persons already U.S. citizens, largely ignore the fact that the decision has been abrogated and that, in the view of certain scholars – but as far as can be determined, never a U.S. Supreme Court Justice – the observation is *obiter dictum*. Accordingly, the issue continues to perplex and confound as the years and successive general elections roll on.

Absent a constitutional amendment either clarifying the meaning of the eligibility restriction – or repealing and/or abrogating it altogether – the debates will continue. Therefore, assuming, *arguendo*, that the pending petition in Docket No. 20-1503 will be denied, it would not be unprecedented for one or more of the Justices to articulate their own views as to the propriety (or impropriety) of that denial. If such a view or views were to be disseminated, the likelihood is that that the issue would finally be perpetually avoided.



As a result, lower court decisions; the products of the Congressional Research Service; the opinions of former Solicitors General; and the bulk of law review articles on the topic would become the ersatz “law of the land” interpreting Art. 2, § 1, Cl. 5. Future debate on the topic would likely diminish significantly, if not completely evaporate.

On the other hand, a granting of the certiorari petition in Docket No. 20-1503 – as happened in *Lujan* – could also result in a decision on the merits, regardless of any dissents, inuring to the benefit of everyone and even if not to the liking of one or the other of the parties in the action.

As Confucius is rumored to have said: “May you live in interesting times.”