Reason Prevails; Rationalization Fails

by Joseph DeMaio, ©2024

Formal group photograph of the Supreme Court as it was comprised on June 30, 2022
(Credit: Fred Schilling, Collection of the Supreme Court of the United States)

(Mar. 4, 2024) — Thank you…, thank you…, yes, your humble servant was right. The Colorado Supreme Court's dumb decision upholding the Colorado Secretary of State's determination to exclude President Trump from the primary ballot was stupid when rendered, as discussed here, and has now been reversed – ahem…, ***9-zip*** – by the Supreme Court in *Trump v. Anderson*.

Reduced to its essence, the *per curiam* (*i.e.*, no single Justice claims authorship) holds that under principles of federalism and the historical relationship between the states and the federal government – including the Congress – Colorado, as a single state of the union, lacked the power or authority to ban from the ballot under the "insurrection" clause of the 14th Amendment a candidate for a ***federal*** office such as the presidency. While states retain the power to ban ***state*** candidates and officials from their ballot, that power cannot – and now, clearly ***does not*** – extend to candidates for ***federal*** offices.

The ruling is refreshingly candid, straightforward and easily understood…, even by a brain-dead Neanderthal such as the slug at 1600, although perhaps Dr. Jill will need to read it to him slowly, while he licks his bed-time ice cream cone…., with his adult drip bib in place.

That reality aside, of course, other knuckle-dragging Democrats who may be not quite as brain-dead as Brandon (*e.g.*, Representative Jamie Raskin (D. Md.)) vow to "work on" legislation to accomplish *via* Congress that which the USSC has said the State of

Colorado cannot unilaterally do itself. Even Raskin concedes any bill he sponsored would be DOA in the House, but "we have to try and do it." Your servant awaits any mainstream media outlet labeling Raskin as resembling "Don Quixote."

People like Raskin are not that much different than the Japanese kamikaze pilots at the end of World War II: prepared to keep "45" from again becoming president or die trying. Memo to Raskin: knock yourself out…, and take some of your pals with you.

Turning to one interesting aspect of the USSC *Trump v. Anderson* decision, although it was "unanimous" in the sense that all nine Justices concurred in the "judgment" – *i.e.*, that the Colorado Supreme Court's judgment barring President Trump from that state's primary ballot must be reversed – several Justices filed "conditioning" statements.

Justice Barrett filed one "concurring in part" and "concurring in the judgment" and called for calm. She notes that "this is not the time to amplify disagreement with stridency." Apparently Raskin did not read that part. On the other hand, the three Democrat-appointed Justices – Sotomayor, Kagan and Jackson – concurring only in "the judgment," complain that the main opinion goes "too far" in addressing the issue and purports to decide "momentous and difficult issues unnecessarily."

Right. Perish the thought that the USSC should try to explain how in its view – the main one that counts – the Constitution and its amendments work in order to give guidance to the nation (and its lawyers) on appropriate, and inappropriate, future decisions regarding proper courses of action to be followed.

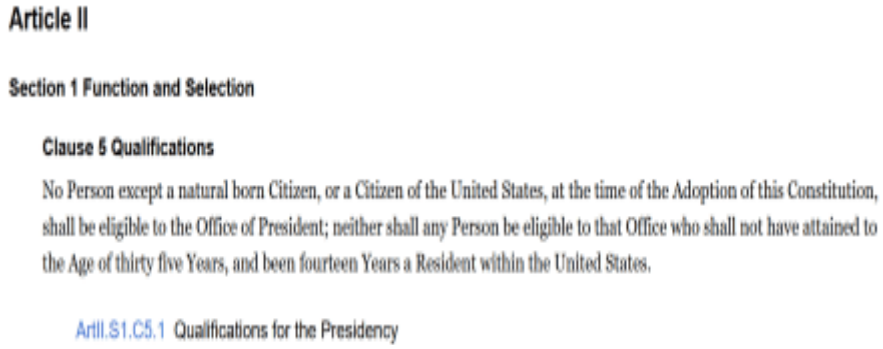
Significantly, the Sotomayor/Kagan/Jackson "concurring in judgment [only]" statement sounds a lot like a formal dissent. But in order to pay "lip service" to the goal of issuing a ***unanimous*** decision in an attempt to "calm the waters," as Justice Barrett suggested, they characterize their statement as a "protest." Specifically, they state that they "protest the majority's effort to use this case to define the limits of federal enforcement of … [Clause 3 of the 14th Amendment]."

First, the issue in the case was not the limitation of ***federal*** enforcement: it was the usurpation of federal enforcement by ***Colorado*** that was wrong. The "protesting" Justices (or their Ivy-league law clerks) may have misread the record from the court below.

Second, a "*per curiam*" opinion does not normally involve a "majority" view or, for that matter, a "minority" view. The term "*per curiam*" means "by the court," meaning the ***entire*** court. A "majority" opinion is normally a signal that one or more "dissenting" opinions exist. While isolated exceptions exist, the Sotomayor/Kagan/Jackson statement, again, reads more like a dissent than anything else.

Finally, the Sotomayor/Kagan/Jackson statement violates its own claim that the "majority" opinion "went too far." Specifically, in addressing whether Cl. 3 of the 14th Amendment is "self-executing," *i.e.*, operational without the need for implementing

congressional legislation, their statement elaborates on ***other*** examples of self-executing provisions of the Constitution. This is done seemingly in further opining that self-executing provisions in contexts ***other*** than the 14th Amendment and in ***future*** controversies are relevant. While those observations may be dictum, they are nonetheless set forth in their statement as being material to their "protest" of the "majority" (*i.e.*, *per curiam*) opinion.



Article II

Section 1 Function and Selection

Clause 5 Qualifications

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Artll.S1.C5.1 Qualifications for the Presidency

That's right, Virginia: they specifically reference Art. 2, § 1, Cl. 5 of the Constitution, *viz*., the "Eligibility Clause" (*see* p. 4, "protest" statement) which has been exhaustively addressed by your humble servant and others here at *The P&E* for many years. While their statement carelessly labels it as the "Presidential Qualifications" clause (addressed here), they specifically recognize it as being an example of the primacy of self-executing constitutional provisions.

And while the USSC has thus far displayed spectacular indifference to addressing and resolving the issue of what the Founders intended and meant when adopting the "natural born Citizen" ("nbC") restriction in the Constitution, the fact that even Sotomayor, Kagan and Jackson recognize the self-executing nature of the Eligibility Clause is a significant step in the right direction. If and/or when the Court decides it can no longer "evade" the nbC issue and actually accepts a case involving the issue, rest assured, the "Sotomayor/Kagan/Jackson protest" statement will be referenced.

In the meantime, President Trump will ***lawfully*** appear on the Colorado primary election ballots. And if the election officials and judges in Maine and Illinois can read plain English – a rebuttable presumption in Democrat-controlled jurisdictions – the same result will obtain in those states as well.

Is that a glimmer of hope and rational thought to be seen peeking over the horizon?