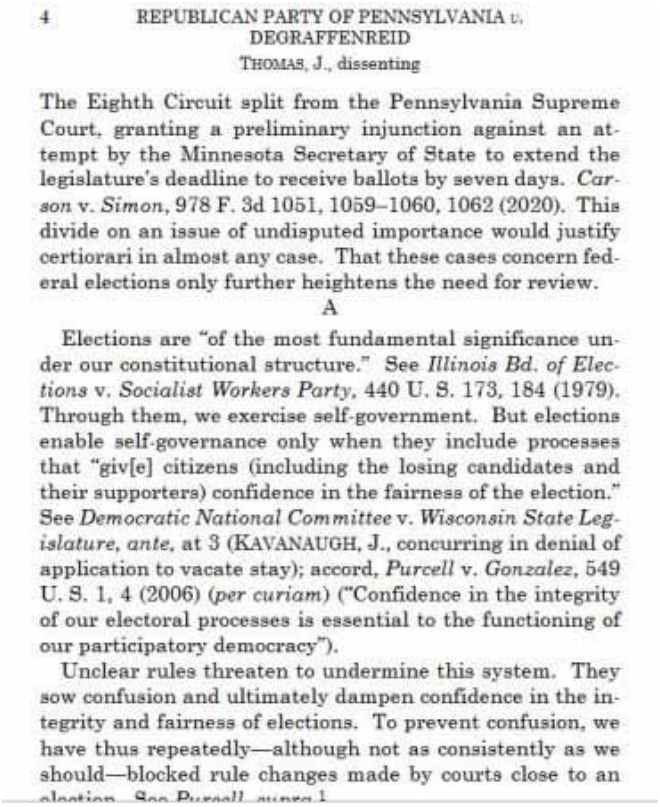
Silhouettes in Courage

"TIMING IS EVERYTHING"

by [Joseph DeMaio](), ©2021



4 REPUBLICAN PARTY OF PENNSYLVANIA v. DEGRAFFENREID

THOMAS, J., dissenting

The Eighth Circuit split from the Pennsylvania Supreme Court, granting a preliminary injunction against an attempt by the Minnesota Secretary of State to extend the legislature's deadline to receive ballots by seven days. *Carson* v. *Simon*, 978 F. 3d 1051, 1059–1060, 1062 (2020). This divide on an issue of undisputed importance would justify certiorari in almost any case. That these cases concern federal elections only further heightens the need for review.

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Elections are "of the most fundamental significance under our constitutional structure." See *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979). Through them, we exercise self-government. But elections enable self-governance only when they include processes that "giv[e] citizens (including the losing candidates and their supporters) confidence in the fairness of the election." See *Democratic National Committee* v. *Wisconsin State Legislature*, *ante*, at 3 (KAVANAUGH, J., concurring in denial of application to vacate stay); accord, *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) (*per curiam*) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy").

Unclear rules threaten to undermine this system. They sow confusion and ultimately dampen confidence in the integrity and fairness of elections. To prevent confusion, we have thus repeatedly—although not as consistently as we should—blocked rule changes made by courts close to an

Source, p. 28

(Feb. 23, 2021) — Yesterday, the U.S. Supreme Court seems to have crept a little closer to becoming the newest member of the Deep State cabal now "governing" the Republic. Your humble servant has in the past noted that if Benjamin Franklin were alive today, he would be weeping at the prospect of the Founders' hard work to create a constitutional republic being set afire.

After yesterday's denial of *certiorari* review on the grounds of purported "mootness" in *Republican Party of Pennsylvania v. Degraffenreid* (USSC Doc. No. 20-542) and *Corman v. Pennsylvania Democratic Party* (USSC Doc. No. 20-574), two cases challenging the legitimacy of the 2020 general election results in Pennsylvania – the birthplace of the Republic – Ben Franklin would be sobbing uncontrollably. Not manly, but hardly unjustified.

Make no mistake, faithful P&E readers, the dissenting opinions of Justices Thomas, Alito and Gorsuch, arguing that the denial of review was wrong and that review should have been granted, reveal in detail the perils awaiting the Republic if its trajectory is not

corrected soon. And if you think the first 30 days of the new administration are bad, as they say: "You ain't seen nuthin' yet."

Since it takes four (4) Justices at their normal weekly conference meetings to vote in favor of granting (or denying) a petition for *certiorari* review, and the conference addressing the two subject cases was held last Friday, Feb. 19, 2021, one might well ask: where were Justices Kavanaugh and/or Barrett (forget about Chief Justice Roberts) when the Republic needed them most? Huh?

The Thomas and Alito dissents are found here, beginning at p. 25. Readers are encouraged to review the two dissents – the first by Justice Thomas, the second by Justice Alito, joined in by Justice Gorsuch – before consuming the rest of this post, because much of what follows gets a bit convoluted and the dissents provide a useful backdrop.

In the cases at issue, both dissents acknowledge that the opposing parties – the Republican Party of Pennsylvania and the Acting Secretary of State of Pennsylvania (in *Degraffenreid*) and Mr. Corman and the Pennsylvania Democratic Party (in *Corman*) – all agreed that the anomalies in the Pennsylvania 2020 general election mail-in ballot fiasco, even if addressed by a grant of *certiorari* review, would not have made an "outcome-determinative difference in any relevant federal election." Bummer.

Translation: even if the Pennsylvania Supreme Court's extra-legislative ruling – extending by 3 days after election day the date for counting mail-in ballots, plainly contrary to the Pennsylvania Legislature's unambiguous deadline of 8:00 PM ***on*** the election day – were to be overturned, the total vote count would not have materially altered the result in that state. Perhaps that is why Justices Kavanaugh and Barrett joined the rest of the Court in rejecting the *certiorari* petitions.

But that is not the point. Both dissenting opinions correctly focus on the real danger presented by a refusal to grant review on the bogus claim that the matter was "moot." A refusal by the Court to clarify now – not later – the operational parameters under Art. 1, § 4, Cl. 1 and Art. 2, § 1, Cl. 2 of the Constitution governing "the manner" in which a state legislature ***alone*** may prescribe how electors are to be appointed may well operate as an invitation to state judicial and executive officers to indulge in the same shenanigans which characterized the 2020 election in Pennsylvania in future elections. Stated otherwise, if Pennsylvania "got away with it" in 2020, who is to say they won't if given the opportunity "get away with it" again in future years?

By analogy, because Barack Hussein Obama, Jr. successfully "got away with" masquerading as a "natural born Citizen" for presidential eligibility purposes not once, but *twice*, a feat seemingly repeated in 2020 by Kamala Harris as to the Office of the Vice-President, why not deem these species of electoral gambits to be the "new normal?"

The sole and exclusive authority of the state legislatures in this regard to prescribe the "manner" in which electors for president are selected and federal elections for Senators

and members of the House of Representatives are conducted under Art. 1, § 4, Cl. 1 and Art. 2, § 1, Cl. 2 of the Constitution is specifically recognized by Justice Thomas through his citation to and reliance upon the prior Supreme Court decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), as discussed earlier here.

The mere fact that, in the absence of a Supreme Court decision clarifying the issues, a state court or executive branch officer may feel free in the future to ignore plain and unambiguous statutory language enacted by a state Legislature – again, the branch of a state government ***exclusively*** possessed of the power to prescribe the manner of appointing electors and holding federal elections under the Constitution – merely underscores the fact that the cases were anything ***but*** moot.

Clearly, the refusal of the Court to address the issues raised holds the potential for either state courts or state executive officers in the future to repeat the usurpations and excesses which the Republic witnessed in November, 2020. Not good. Then again, courage is not one of the qualifications needed to hold a seat on the Supreme Court.

Ironically, Justice Thomas notes that the Court's refusal to grant *certiorari* – after ***all*** parties had originally supported a grant of the *certiorari* petitions well before the Nov. 3, 2020 election to clarify the protocols, which support the Democrat parties withdrew after Nov. 3, 2020 – "is inexplicable." *See* Thomas dissent at 2. With due respect to Justice Thomas, the refusal is not inexplicable at all. Indeed, the chronology of events is important. In this regard, the scheduling of the conferences to be held where the question of whether review will (or won't) be granted is normally a function of the Office of the Clerk of the Court.

However, while the Court's protocols and rules do not specify, in so many words, when cases will be scheduled for conference, because the Chief Justice chairs these conferences and sets their agendas, it would not be anomalous to speculate that the Chief Justice – in consultation with the Clerk, of course – might "influence" which cases are scheduled for particular conference days. *See, e.g., Doctrinal and Strategic Influences of the Chief Justice: The Decisional Significance of the Chief Justice*, 154 U.Pa.L.Rev. 1665, 1669 (2006) ("By controlling the conference, for example, *the Chief may be able to pick the most strategic time to call a vote*, such as when a swing vote appears to be leaning in the desired direction.") (Emphasis added). Stated otherwise, as they say: "Timing is everything."

Normally, cases are "at issue" and thus ready for "conference" when all of the parties' briefs have been filed and, in some instances, after all *amicus curiae* ("friend of the court") briefs have been filed. In these two Pennsylvania cases, the original petitions were filed prior to the general election, including an application for a stay filed Sept. 28, 2020 in *Degraffenreid* (Doc. No. 20-542). In both the *Degraffenreid* and *Corman* cases, certain *amici curiae* briefs had been proffered to the Court, both supporting the ***granting*** of *certiorari*. No ruling on the filing of these briefs was made until yesterday.

The *amicus curiae* brief of the "Honest Elections Project," specifically urging expedited review, was filed on Oct. 26, 2020 (*Degraffenreid*) and the *amicus curiae* brief of the "White House Watch Fund," also urging the grant of *certiorari*, was filed Nov. 30, 2020. Note, faithful P&E readers, that *all* of these dates are well ***before*** the Jan. 6, 2021 convening of the Joint Session of Congress where the final counting of the 2020 general election Electoral College votes was to take place. Oh, and by the way, not that it made any difference in the ruling, leave to formally file both *amicus curiae* briefs was granted in the same Feb. 22, 2021 order of the Court denying *certiorari*. All tied up in a neat bow.

An argument can be made that, given the stakes at issue, it would have been nice to have had a Supreme Court ruling on the issues presented in the two cases *before* Jan. 6, 2021. Things might have unfolded differently. Had the justices' conference been scheduled earlier…, say in November 2020, December 2020 or sometime prior to Jan. 6, 2021 (or even before the date of the inauguration, Jan. 20, 2021), there might well be a different person residing at 1600 Pennsylvania Avenue right now.

However, because the conference was not held until Friday, Feb. 19, 2021, with the decision denying *certiorari* handed down the following Monday, Feb. 22, 2021…, well, that's just how the cookie crumbles. Now, the Goofball-in-Chief occupies the Oval Office and a likely ineligible Vice President lives at the U.S. Naval Observatory. How convenient. Again, timing is everything.

Finally, the Alito/Gorsuch dissent notes that, because the cases were "not moot," and because there existed a "reasonable expectation" that the parties "will face the same question in the future," the denial of *certiorari* will likely generate a high likelihood that "the question will evade future pre-election review, just as it did in these cases." *See* Alito dissent at 4.

The "evasion" of pre-election review of difficult or controversial issues is increasingly becoming a hallmark of Supreme Court "jurisprudence." As noted by Justice Thomas when testifying to Congress many years ago, he commented that the issue of presidential eligibility as a "natural born Citizen" was one which the Court "was evading."

It is interesting that Justice Thomas, in explaining why the Supreme Court has not yet taken up an "eligibility" case on the merits, would select the term "evading" as opposed to "avoiding," since the prior term suggests a conscious decision to "avoid facing up to" a difficult or known obligation.

Again, courage is not a component of character required to become or remain a Supreme Court Justice. The dissenters here have the courage which seems to be missing elsewhere. Is this a great country, or what?