The Democrats' "Hillary/Barack Hail Mary"

"A CASE FOR THE AGES"

by Joseph DeMaio, ©2020

(May 6, 2020) — Please…, please let this come true: if (*i.e.*, *when*) Joe Biden flames out either before, during or after the Democrat Convention in Milwaukee this coming August, the idea is being floated that a potential substitute candidate (and ticket) to replace him would be… drum roll…. Hillary Clinton and Barack Hussein Obama, Jr. Not kidding, Virginia.

The Democrats are so desperate to oust President Trump, yet so petrified – with good reason – that Joe ("Wow,-little-girl,-your-hair-smells-*great*!") Biden is about to crash and burn on the tarmac, that some are actually considering a ticket headed by Clinton for president, with Obama as vice-president. However, as correctly pointed out by George Washington University Law School Professor Jonathan Turley, for a variety of reasons, that ain't gonna happen.

Nonetheless, the issue has surfaced in a post appearing at *The Hill* which references in support of the idea a Cornell Law School Professor, one Michael Dorf. *The Hill* post cites a 2015 article in *The Washington* ("Hello-Darkness-My-Old-Friend") *Post* characterizing Dorf as a "constitutional expert" who would likely conceptually support a Clinton-Obama ticket.

The theory Dorf advanced back in 2000 was that a former president could be deemed "eligible" to serve as a vice-president as described in an article he wrote while he was at Columbia University Law School and positing that Bill Clinton could run on an "Al Gore/Bill Clinton" ticket. The gist of Dorf's argument was that, while Bill Clinton could not be twice *elected* "to the office of president," he could still run as a vice-presidential candidate with Gore and, perish the thought, if Gore for whatever reason left that office, Clinton would "ascend" or "succeed" to the office rather than be "elected" to the office. Same here: Clinton out, Obama in. Interesting argument, but off-point.

As Professor Turley notes in his post, there are many reasons why, because of the restrictions of the 12th Amendment and the 22nd Amendment, neither an "Al Gore/Bill Clinton" ticket in 2000 nor a "Hillary Clinton/Barack Obama" ticket in 2020 would pass the constitutional smell test. However, both Professor Turley and Professor Dorf – respectfully – focus on the wrong constitutional provisions in arriving at their respective, albeit differing, conclusions.

Stated otherwise, both law professors confine their focus to the "eligibility" and "elected vs. succession" issues in terms of the intent underlying the 12th and 22nd Amendments. No attempt by either professor is made to address the 900-pound gorilla over there in the corner, which faithful P&E readers will immediately recognize: Art. 2, § 1, Cl. 5 of the Constitution, the "natural born Citizen" eligibility clause. In Professor Dorf's case, that failure is somewhat excusable, since in 2000, the "natural born Citizen" issue was essentially dormant and ignored since the time of the first usurpation of the United States presidency by "President" Chester A. Arthur back in 1881. Nonetheless, Dorf's failure to address, even dismissively, Art. 2, § 1, Cl. 5 is surprising in a (sniff…) Columbia Law School Vice Dean and Professor of Constitutional Law.

On the other hand, Professor Turley cannot be so excused. He was around in 2008 when the original questions surrounding Barack Hussein Obama Jr.'s eligibility began swirling. Indeed, in 2008, he authored an article concluding that, as to Mr. Obama, the likelihood is that since he could not be proven to be *ineligible* to the presidency, we may as well just accept that as fact. Unless he has changed his mind since 2008, he likely remains convinced that Mr. Obama is – or would likely be held by the Supreme Court to be – a "natural born Citizen."

Interestingly, Turley's views on the issue, at least as articulated in his 2008 post above, are based largely on the "political," "cultural" and/or "institutional" preference and tendency of the Supreme Court to avoid rather than squarely address or engage in constitutional confrontations "except in the most unavoidable circumstances." Respectfully, when the Founders drafted and ratified the Constitution, they were guided by principles intended to establish a republic – not a direct democracy – governed by the rule of law rather than one guided by fleeting political, cultural and institutional factors. That's why they allowed for amendments. Stated otherwise, expediency and judicial avoidance of "tough questions" were not on the minds of the Founders when they drafted the Constitution and created a "Supreme Court."

Memo to Professor Turley: does not the constitutional eligibility of the person who would be Commander-in-Chief of the planet's most powerful military, with access to the codes for the "nuclear football," constitute an issue of sufficient gravity to warrant examination and either ratification or refutation by the Supreme Court? Follow-up memo: given your criticisms of the "narrowing" of the standards to establish "standing" to litigate issues of this nature, would it not make sense for the Supreme Court to take on a live "case or controversy" addressing these issues sooner rather than later?

Moreover, would it not be prudent for such a move to take place in order to put the issue to rest, instead of allowing deeply deceptive memoranda and reports of the Congressional Research Service and scholarly magazine articles by other "experts" to establish flawed governmental policy? And would this not be consistent with your belief that a broader application of the rules of "standing" should be reinstituted?

In this regard, Professor Turley also laments the reality that "[s]tanding has been so narrowed in the last few decades that there are now some constitutional provisions that seem unenforceable in court for lack of anyone with standing." Really? Parts of the foundational document of the Nation are now "off-limits" because either no litigant can be found with the requisite "particularized stake in the outcome" (*i.e.*, standing) to get in the front door of the Supreme Court? Seriously?

In fact, if the highly unlikely "ticket" of Hillary Clinton at the top, with Barack Hussein Obama, Jr. at the bottom, emerged, there is one person who would plainly have – even now – a "particularized stake in the outcome" of a case challenging the eligibility of Obama as vice-president should he even be included on a post-Biden implosion ticket: Donald J. Trump. The opportunities for interrogatories, requests for admissions and depositions of Obama would be, shall we say…, juicy.

But as Jonathan Turley predicts, it's not going to happen, at least not with a Supreme Court as currently constituted. Too bad. ***That*** would be a case for the ages…, no?