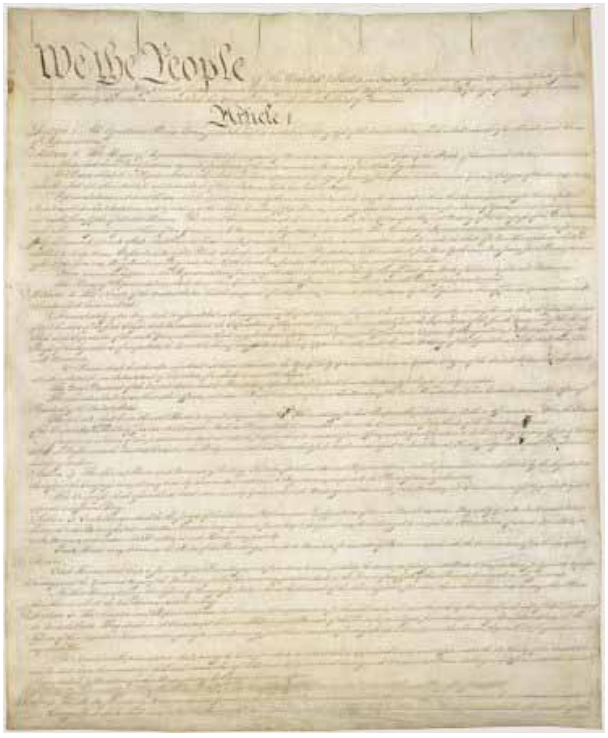
The Four Corners of the Constitution

"'EVASION' OF THE ISSUE"

by Joseph DeMaio, ©2021



(Jun. 1, 2021) — Once again – lamentably, but not unexpectedly – the U.S. Supreme Court has successfully evaded addressing, let alone resolving, the question of what the "natural born Citizen" clause in the Constitution means. On Tuesday, June 1, 2021, the Court again denied a petition for a writ of certiorari in "Laity v. Harris," Docket No. 20-1503. Regrettably as well, it did so without a single dissenting comment from any Justice, as discussed here.

Stated otherwise, one day after Memorial Day, 2021, the Court in effect memorialized the likely death of any future challenges to the eligibility of any person who, through guile, fraud or other artificial contrivance, can bamboozle the electorate (oh…, and the Congress…,) into believing that the person is eligible to the presidency simply because of his/her birth here.

Future debate on the topic will likely diminish significantly, if not evaporate completely…, unless and until a Republican presidential candidate with questionable "de Vattel" bona fides appears on the scene. Then watch the Gray Trollop reignite the debate.

Unless the Court changes its collective mind following a promised motion to reconsider from Mr. Laity, the ersatz "law of the land" regarding the meaning of the "natural born Citizen" clause will now be informed by lower federal and state court decisions; the products of the Congressional Research Service; the opinions of former Solicitors General; the talking heads of CNN and MSNBC; and the bulk of law review articles on the topic…., but not the U.S. Supreme Court.

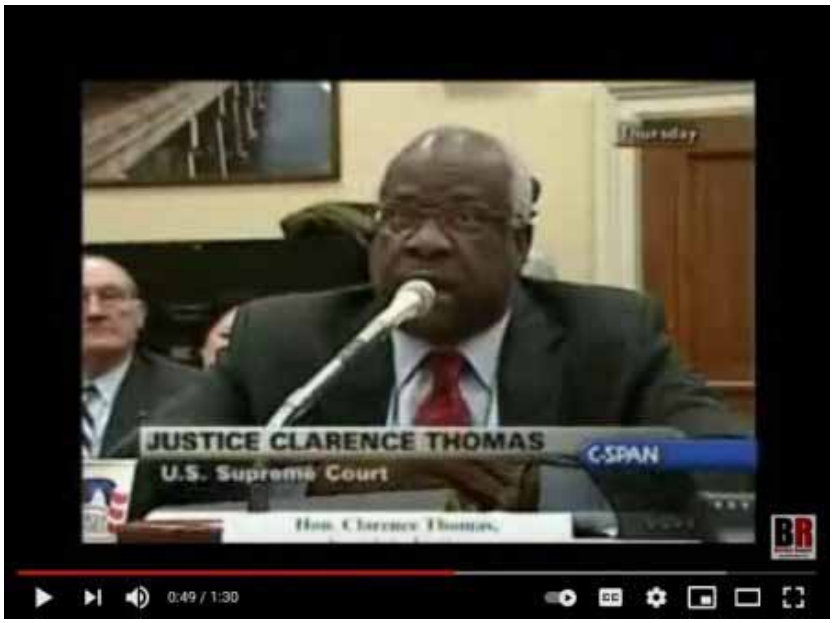
Indeed, the Court's refusal to grant the Laity *certiorari* petition – if for no reason other than to address the "standing" issue in the context of the self-executing mandates of Art. 2, § 1, Cl. 5 as opposed to "standing" in the context of laws passed by Congress, thus implicating "separation of powers" concerns – sets the stage for virtually anyone merely born here, if elected, to usurp the presidency as well as the vice-presidency.

That may be the goal of the Goofball at 1600, his humorless sidekick and folks like George Soros, but it is not likely a goal that would be shared by the Founders, the products and pontifications of the Congressional Research Service aside.

Recall, faithful P&E readers, that back in 2010, Associate Justice Clarence Thomas confirmed to Congressman Jose Serrano that with respect to the question of eligibility to the presidency under Art. 2, § 1, Cl. 5 of the Constitution, the Court was "evading" that issue.

Now, more than a decade after Justice Thomas made his comment, the Court has once more reprised its "evasion" of the issue. In the District of Columbia, it would appear that there are some issues just too radioactive to squarely address, even for the Justices of the Supreme Court. And with the hyenas of the left and the Democrat Party – forgive the redundancy – threatening the Court with limiting its jurisdiction and neutering its present quasi-rational majority by packing the tribunal with radical, leftist judges, the bullying may be working.

Moreover, as discussed here, it is telling that back in 2010, Justice Thomas, in explaining why the Supreme Court had not at that time yet taken up an "eligibility" case on the merits would select the term "evading" as opposed to "avoiding," when the eligibility issue involved one Barack Hussein Obama, Jr.



https://ww*w.youtube.com/watch?v=Eu6OiTiua08*

Words are important. The term "evade" conveys the sense of a conscious decision to dodge addressing and answering the eligibility issue. The accepted definition of "evade" includes "to take refuge in

escape or avoidance," "to elude by dexterity or stratagem" and to "avoid facing up to" a difficult or known obligation.

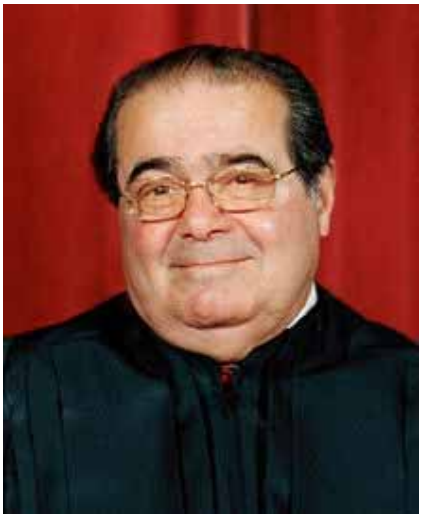
Mind you, the Court possesses an arsenal of weapons to deploy making it seem that justification exists for refusing to act, including (the perennial gold medal favorite), a lack of "requisite standing" in the plaintiff. A close runner-up, garnering the silver medal, is that the issue is "moot" or "non-redressable," meaning that no "case or controversy" remains as to which a judgment could be enforced, as, for example, eligibility challenges after a usurper has been sworn into office. The bronze medal goes to the "political question" ruse, whereby the Court purports to identify some aspect of the issue implicating the Congress or the Executive, leading to a faulty but preferred conclusion that no room remains for judicial intrusion.

Each of these judicial mechanisms culminates in the same thing: "Move along…, nothing to see here."

In the Laity case, although no explanation has yet appeared for why the *certiorari* petition was denied, the most likely one (and the one relied upon by the District of Columbia Circuit Court of Appeals from which Laity sought review) was the gold medal contender: lack of requisite standing. And yet, as discussed here, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), while the Court denied the plaintiffs the relief they sought under a petition for *certiorari* because they lacked the "requisite standing" mandated by Court precedent, at least the petitioners were allowed "in the front door" to make their case that, in fact, they possessed standing. They lost their argument, but at least they were allowed to make it.

Interestingly, their standing arguments were premised on the claim that federal regulations promulgated by Executive Branch officials (*i.e.*, the Secretaries of the Interior and Commerce) limiting to the United States the geographic areas to which a particular section of the federal Endangered Species Act of 1973 applied, were unlawful. The plaintiffs were concerned over environmental habitat damage taking place in… Egypt and Sri Lanka.

Justice Antonin Scalia, for the Court, held that the plaintiffs lacked the requisite standing or "particularized, concrete, individual injury" arising from the Executive Branch regulations. Yet, they were allowed to make their arguments, resulting in a 7-2 Supreme Court Decision (Justices Blackmun and O'Connor dissenting). Mr. Laity has been denied the opportunity to make his argument to the Court, presumably because he lacks "requisite standing."



The late U.S. Supreme Court Associate Justice Antonin Scalia
died in February 2016

It is one thing to contend that standing to maintain a judicial action challenging Executive Branch or Legislative Branch actions requires a demonstration of a "particularized, concrete, individual" injury traceable to the purported unlawful regulatory or legislative acts of one or the other of the two non-judicial branches of the government. It is quite another to contend that the same concerns apply to require a "particularized, concrete, individual" injury when the mandatory restrictions of the Constitution itself – not the Executive Branch and not the Legislative Branch – are involved.

While actions in the former category may well implicate separation of powers issues, the same is not true when, instead of co-equal branches of government being involved, it is the Constitution *qua* the Constitution under consideration.

Moreover, the question of one's constitutional "eligibility" must be differentiated from one's "qualifications." As noted here, the relationship between the question of whether one is "eligible" to a position and whether one is "qualified" for the position is tangential, at best.

By way of analogy, a highly-skilled NFL wide receiver may be extraordinarily "qualified" by virtue of speed, dexterity and physical abilities to catch long passes from his quarterback. But if the referee throws a penalty flag for "*ineligible* receiver downfield," the play will be nullified, even if the pass is caught.

The same principle applies to the presidency: one who is at inception ineligible to the presidency, yet nonetheless unlawfully occupies the office illegitimately through usurpation, is subject to the penalty of impeachment and removal. It is that simple. And that threshold analysis neither involves nor implicates separation of powers concerns.

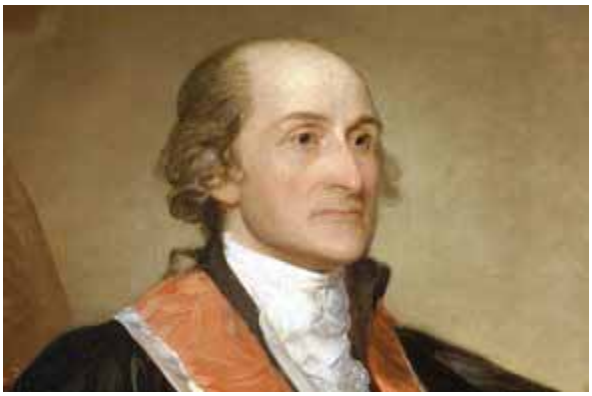
Thus, that which is perceived as "requisite standing" for cases and controversies involving either Executive Branch or Legislative Branch actions have – or logically *should* have – no bearing on "requisite standing" for "four-corners-of-the-Constitution" controversies. Such controversies involve, as in the Laity case, mandatory constitutional proscriptions rather than Executive Branch or Legislative Branch discretionary actions.

Under some judicial interpretations of these matters, the question is treated as one precluding adjudication by the judiciary of the threshold issue (*i.e.*, self-executing restricted eligibility under Art. 2, § 1, Cl. 5) *because* the later issue of "disqualification from office" is purportedly "assigned" or "committed exclusively to the Congress." *See, e.g.*, *Constitution Association, Inc. v. Kamala Devi Harris* (Case No.: 20-CV-2379 TWR (BLM)) D.C Cal., cited in 3:27 PM 5/17/21 comment here. This circumstance raises, purportedly, a "separation of powers" issue, justifying rejection of "standing" on those grounds.

This reasoning is a *non sequitur*, because the argument assumes that the discretionary, optional "disqualification" actions taken by the Congress at a later date can somehow affect and determine, *nunc pro tunc*, (*i.e.*, "now for then" or retroactively) the threshold "eligibility" issue. This is nonsense elevated to an art form, yet it provides a handy and plausible-sounding excuse for allowing – and even intellectually subsidizing – the future usurpation of the office by others.

The real question, however, is this: who gets to decide the threshold issue of "eligibility" as opposed to the later question of "disqualification?" Eligibility to even enter the office seems clearly to precede any later determination of "qualifications" for the office or "disqualification" from further service for some "high crime or misdemeanor."

Indeed, while Art. 2, § 1, Cl. 5 of the Constitution – the restriction on eligibility to exclusively a "natural born Citizen" – is a self-executing, prohibitory mandate, while in contrast, impeachment, removal and "disqualification to hold and enjoy any Office of Honor, Trust or Profit of the United States…" is reposed in the Congress under Art. 1, § 3, Cl. 7. This does not, however, raise or implicate a separation of powers issue.



Founding Father John Jay suggested to George Washington in a 1787 letter that the president and "command in chief" should be limited to a "natural born Citizen"

The foregoing notwithstanding, the Court – ahem…, did I mention, without dissent? – has spoken. Mr. Laity's petition for a writ of *certiorari* has been denied, presumably because of a lack of showing the "requisite standing" to maintain the action. Mr. Laity has vowed to continue the fight, first with a "motion for rehearing" and then, should that motion also be denied, with a "Plan B."

Robert Laity is, if nothing else, persistent and undeterred.