The Quo Warranto Avenue

by [Joseph DeMaio](), ©2021

https://www.youtube.com/watch?v=SfTRfzF470c

(Jun. 12, 2021) — OK, in the continuing simmering stew of issues bubbling around the 2020 general election and the results of same, one particular issue caught your humble servant's eye. That issue concerns the role now being played by "The My Pillow Guy," Mike Lindell. While his heart may be in the right place, an argument could be made that he is not receiving the best of legal advice.

Specifically, he has recently claimed via YouTube that, sometime during the month of July, 2021, a case based on a "writ of *quo warranto*" will be brought directly in the U.S. Supreme Court ("USSC") which will result in a 9-0 (*i.e.,* unanimous) decision overturning the 2020 general election and reinstalling President Trump into office. Really? It will be interesting to see if that YouTube video stays posted much longer.

To begin with, the legal principle of "*quo warranto*" manifests itself as a legal "writ" issued by a court to test and challenge the continued assertion of some legal authority claimed to be unlawfully exercised. The Supreme Court has held with regard to such writs: "*Quo warranto* is addressed to preventing a continued exercise of authority unlawfully asserted, *not to a correction of what already has been done under it or to a vindication of private rights.* It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for *there is no statute delegating to an individual the right to resort to it.*" (Emphasis added, footnote 16, citations omitted). *See Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 502 (1933).

The relevance of that decision to the action being contemplated by Mr. Lindell remains to be seen, but it is a safe bet that the "other side" would cough it up in opposition.

As to the statutory basis for a *quo warranto* action, in 1948, Congress passed, and President Truman signed into law, 28 U.S.C. § 1651, the "All Writs Act." That statute seems to authorize "private" actions, but provides, in relevant part: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis added) That act – covering "all writs" – would seemingly apply to writs in the nature of *quo warranto*, although the most frequently sought writ under the law is the writ of *habeas corpus.*

However, with very few exceptions (*e.g*., original jurisdiction over disputes between two or more states), the USSC exercises only appellate (review) jurisdiction over decisions *already rendered by a lower court*, usually by a *writ of certiorari*, and based on the factual record developed and assembled in the lower or trial court.

The problem Mr. Lindell (or his lawyers) could face is that Rule 20 of the USSC Rules provides, in relevant part: "Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, *the petition must show* [1] that the writ will be in aid of the Court's *appellate* jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3] that adequate relief cannot be obtained in any other form or from any other court." (Emphasis added) If any single criterion is missing, the likelihood is that the petition or request for the writ will be dismissed or denied.

24 SUPREME COURT RULE 20

Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. §1651(a), §2241, or §2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name

Your humble servant is no expert on USSC procedure, but it seems pretty clear that, quite apart from the standard impediments to acceptance of USSC jurisdiction normally utilized by the Court to "evade" an otherwise disfavored issue (*e.g.,* "requisite standing,"

“separation of powers” or “political question”), the federal statute and Rule 20 of the USSC Rules alone would seem to require that any such *quo warranto* action be at minimum first initiated in a lower federal District Court then, if no relief were granted there, brought on appeal to a Circuit Court of Appeal, and thereafter, assuming no relief were obtained there, then brought to the USSC for its *appellate* review.

Moreover, there is even a question as to whether a “private” *quo warranto* action brought in U.S. District Court would “fly” given the decision in *United States ex rel. State of Wisconsin v. First Federal Savings and Loan Assoc.*, 248 F.2d 804, 809 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958). There, the lower court held that “except as otherwise specifically provided by statute, there is *no original jurisdiction* in the federal district court to entertain an information in the nature of *quo warranto*.” (Emphasis added).

Accordingly, even if initiated by sundown today, the promised *quo warranto* relief likely won’t happen in this case at all and, in any event, not during July 2021.

Mr. Lindell might do well to confer with his advisors again, as anomalies of this nature only supply oxygen and ammunition to those committed to the rubric: “Move along… nothing to see here….”