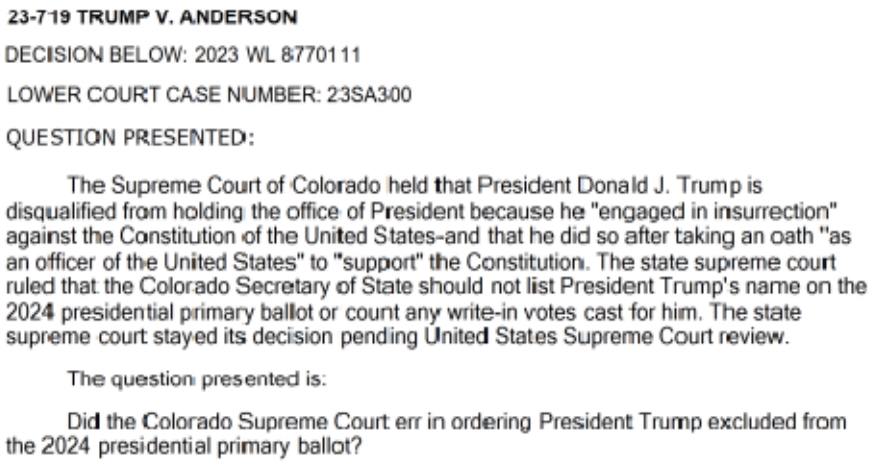
The USSC Oral Arguments in "Trump v. Anderson"

by Joseph DeMaio, ©2024



23-719 TRUMP V. ANDERSON

DECISION BELOW: 2023 WL 8770111

LOWER COURT CASE NUMBER: 23SA300

QUESTION PRESENTED:

The Supreme Court of Colorado held that President Donald J. Trump is disqualified from holding the office of President because he "engaged in insurrection" against the Constitution of the United States-and that he did so after taking an oath "as an officer of the United States" to "support" the Constitution. The state supreme court ruled that the Colorado Secretary of State should not list President Trump's name on the 2024 presidential primary ballot or count any write-in votes cast for him. The state supreme court stayed its decision pending United States Supreme Court review.

The question presented is:

Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?

https://www.supremecourt.gov/docket/docketfiles/html/qp/23-00719qp.pdf

(Feb. 9, 2024) — Well, oral arguments have been heard in the Supreme Court in the case of *Trump v. Anderson* (USSC Doc. 23-719). The case addresses the question of whether President Trump can be excluded from the primary election ballot in Colorado on the claim that Clause 3 of the 14th Amendment (the "Insurrectionist Clause") disqualifies and precludes him from serving as president in the future as held by the Colorado Supreme Court and addressed here and here. The oral arguments were interesting and a decision of the Court is expected soon.

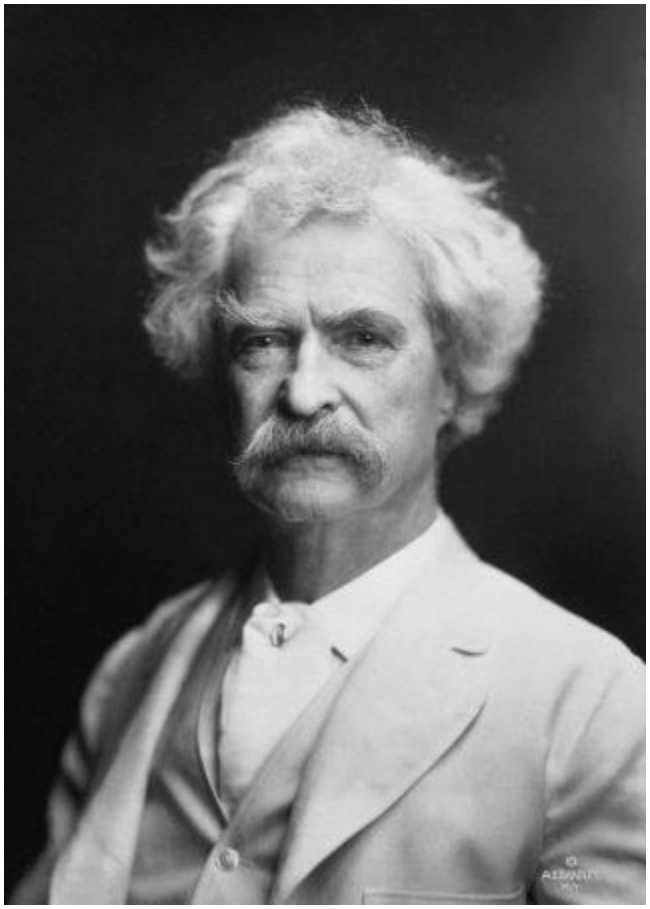
However, as pointed out here, perhaps one of the more significant and relevant issues that came up at the oral arguments were the discussions by the attorneys and questions from the Justices regarding – faithful *P&E* readers knew this was coming – the natural born Citizen ("nbC") issue. For those interested, the transcript of the oral arguments can be found here and will hereafter be referenced as "O/A transcript, p. __."

None of the exchanges between the Justices and the attorneys resulted in a "universe shattering" or "***aha!***" revelation that, in fact, the nbC argument that your humble servant, along with many others here at *The P&E* have been offering for years, is either correct or incorrect.

On the other hand, there were certain anecdotal "hints" about where certain of the Justices might presently sit on the nbC issue. Candidly, they are not in your humble servant's view particularly encouraging…, but if he is wrong in that evaluation, it would not be the first time.

The relevance of the exchanges on the nbC issue during the *Anderson* oral arguments lies in the fact that, as with Clause 3 of the 14th Amendment – the "Insurrectionist Clause" being deployed by Colorado to preclude President Trump from again serving as president – the "Eligibility Clause" of the Constitution precludes any person other than an nbC from serving as president.

While not directly controlling, the forthcoming decision of the Court in *Anderson* could well preview what a similar decision might be in an nbC case actually brought before the Court…, or maybe not. It is usually risky to predict with any certainty how the Court will actually rule in any particular case. One "reads the tea leaves" of the oral argument for any insight into final Supreme Court rulings at one's own peril, particularly in polarized times such as at present.



Mark Twain (b. Samuel Clemens), 1907 (Wikimedia Commons, public domain)

Mark Twain wisely noted that words are important and precision in language is critical, stating: "The difference between the almost right word & the right word is really a large matter – it's the difference between the lightning bug and the lightning." His observation takes on even greater importance when the words are uttered by Supreme Court Justices. And the words uttered in the *Trump v. Anderson* case may give some small hint as to why the Court has not, as yet, squarely addressed the nbC issue, apart from its "radioactive" nature.

The final written decision in the *Anderson* case, of course, may give additional hints, but for now, the following points are offered for consideration against the backdrop of the "tea leaves" caveat already noted.

To begin with, several of the Justices carelessly referred to the nbC definitional restriction as a "qualification" provision. Observing Twain's advice, and with respectful deference to the Justices, the better term is "eligibility." A person may be well-qualified for a task or calling, but yet be ineligible.

As but one example, there are probably many naturalized U.S. citizens who by virtue of intelligence, character and reverence for the Constitution are ***more*** than well "qualified" to be president, particularly as contrasted with the current one. Yet they are still "ineligible" by virtue of the restrictive language of Art. 2, § 1, Cl. 5 of the Constitution, a fact already confirmed by the Supreme Court itself in *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

There, the Court stated: "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity, and are coextensive. The only difference drawn by the Constitution is that ***only the 'natural born' citizen is eligible to be President.***" (Emphasis added)

Importantly as well, the *Rusk* Court correctly avoided use of the term "citizenship" when referring to that restrictive category of persons "eligible" to the presidency: those persons are both "native-born" and constitute "natural born citizens," but the term "natural born citizenship" appears nowhere in the Constitution; nowhere in the 27 Amendments to the Constitution; and nowhere in any Supreme Court decision. In short, it is a concocted neologism without meaning or purpose – other than obfuscation and deception – in any serious analysis of the nbC issue.

And yet in the *Anderson* oral argument, Justice Sotomayor references (O/A transcript, p. 23) "other qualifications" in the Constitution bearing upon one's presidential eligibility, including age and "citizenship." Again, while her words may be imprecisely chosen, it is clear that she was referring to Art. 2, § 1, Cl. 5 and the "nbC" ***eligibility*** definitional restriction.

Recall that while all natural-born citizens are also native-born "citizens" and both enjoy United States "citizenship" under the 14th Amendment, not all native-born citizens meet the definitional restrictions placed by the founders on those who would be president, *i.e.*, the "natural born Citizen." *See Schneider v. Rusk.*

As consistently posited by your humble servant, the Founders manifested a clear intent to adopt the highly restrictive definition of an nbC provided by § 212, Book 1, Ch. 19 of the 1758 legal treatise by Swiss jurist, lawyer and scholar Emer de Vattel, "*The Law of Nations."* That treatise, in both French and English, was available to the Founders as they drafted the Constitution, including the Eligibility Clause.

The de Vattel § 212 definition – a person born in a country to two parents who were already citizens of that country – presents a much higher barrier to the potential for insinuation of "foreign influence" into the presidency than the lower barrier of the 14th Amendment "citizen at/by birth" narrative currently in vogue, including perhaps in Justice Sotomayor's mind. One problematic and unfortunate conclusion to be possibly drawn from her imprecise language during oral argument is that she may already believe that mere 14th Amendment "citizenship" suffices to deem one a "natural born Citizen" for presidential purposes. Not good. Bad.

That belief is akin to the default narrative "close enough for government work" and as purportedly "settled" by the decision in *United States v. Wong Kim Ark* ("*WKA*)." Respectfully, if that is her belief, your servant posits that she is wrong.

Parenthetically, and respectfully as well, she was also wrong when she misstated (O/A transcript, p. 23) that the 22nd Amendment "doesn't permit anyone to ***run*** for a second term." (emphasis added) In fact, that amendment precludes a person from being "***elected***" more than twice – rather than "running" more than twice – thus prohibiting the person from "***serving***" as president for a ***third*** term. As noted by Twain, words are important, a reality particularly true when they are used carelessly by Supreme Court Justices.

But Justice Sotomayor was not the only jurist utilizing less-than-precise language to describe the nbC personage. Justice Gorsuch, in addressing whether a state could remove or ignore certain requirements from those listed in the Eligibility Clause, Art. 2, § 1, Cl. 5, referred (O/A transcript, p. 82) to "age and citizenship."

Justice Gorsuch, in questioning the attorney for the Colorado parties, stated (*id.*): "Nobody's talking about whether he's [*i.e.*, Trump] 35 years old *or a natural born, whatever*, right, not at issue, okay." (Emphasis added). Again, clearly when Justice Gorsuch was referencing a "whatever," he was referring to a "natural born Citizen" as set out in the Eligibility Clause. As with Justice Sotomayor, Justice Gorsuch was plainly referring to the Eligibility Clause and the "nbC" restriction, again, there being no "natural born citizenship" neologism in that clause or, for that matter, anywhere else in the Constitution.

> JUSTICE GORSUCH: Could they do it without Section 3? Could they disqualify somebody for -- you know, on whatever basis they wanted outside of the Qualifications Clause?
>
> MR. MURRAY: That would run into Term Limits.

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-719_feah.pdf

Justice Gorsuch also refers (O/A Transcript, p. 79) to the requirements set out in Art. 2, § 1, Cl. 5 as elements of the "Qualifications Clause." Again, the preferred nomenclature would be the "Eligibility Clause," because that is what it is, and certainly not a "Natural Born Citizenship" provision as deceptively labeled by the Congressional Research Service ("CRS") in its 2016 report R42097-2016. That CRS "product" is woefully mislabeled as "Qualifications for President and the 'Natural Born' Citizenship Eligibility Requirement" and is dissected here.

But again, I digress.

As with Justice Sotomayor, Justice Gorsuch's use of the term "citizenship" might also be interpreted as "hinting" that he too believes that all that is needed to satisfy the Constitution's nbC restriction is that one be possessed of U.S. "citizenship" under the 14th Amendment consistent with the Court's flawed decision in the *WKA* case. Again, with due respect, if that is his belief, your servant posits that he is wrong as well.

Accordingly, the oral arguments in the *Anderson* case reveal several anecdotal "hints" or "suggestions" that at least Justices Sotomayor and Gorsuch may already think that the nbC issue is controlled by *WKA* and that the "citizen at/by birth" standard narrative is "close enough for government work."

That said, it should be noted that in responding to a question from Justice Alito, one of the attorneys for the Colorado parties commented on the differing criteria used by different states in determining ballot access to candidates. The lawyer stated (O/A transcript, p. 134): "Just this election, there's a candidate who Colorado excluded from the primary ballot, who is on the ballot in other states *even though he is not a natural-born citizen*. And that's just – that's a feature of our process. *It's not a bug*." (Emphasis added)

Well, if it is ***not*** a "bug" in the sense that Mark Twain would think of "bugs," it could be a problem on two fronts: (1) if State "A" determined to exclude Kamala Harris from the ballot because she is likely not an nbC, as frequently noted by your servant here at *The P&E*, but State "B" determined to keep her on in the belief that she *was* an nbC…, the nationwide inconsistencies and wholesale voter disenfranchisements which Justice Alito feared could result would be wide and chaotic; and (2) the nbC constitutional eligibility question would remain unresolved. Not a great outcome.

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Stated otherwise, the present situation ***is*** a bug – whether a cockroach or a ladybug is yet to be determined – and the time fast approaches when the "Supreme Court Pest Control" service must be called…, and that outfit ***must*** respond. Some indication of ***how*** it will respond may be gleaned after the *Anderson* decision is handed down.

Interesting times…, no?