USSC “Opinions Relating to Orders” and “Summer Order Lists”

WHO HAS "THE FINAL SAY" ON PRESIDENTIAL ELIGIBILITY?

by Joseph DeMaio, ©2021

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(Jul. 6, 2021) — In addition to writing majority opinions, dissenting opinions and concurring opinions, Justices of the U.S. Supreme Court sometimes prepare and issue “Opinions Relating to Orders.” These opinions constitute the view of one or more of the Justices relating to the summary disposition of cases. The most common instance of a summary disposition of a case before the Court is that of a denial of a petition for a writ of *certiorari*.

A Justice who wishes to concur in such a denial, dissent to the denial (or, for that matter, to the granting of *certiorari*) or simply comment on the status of the case may prepare and issue his/her personal opinion regarding the action of the Court. Your humble servant made such a suggestion here with respect to the case of *Laity v. Harris*, USSC Docket No. 20-1503. With that brief backdrop, let us briefly revisit the case.

The litigation, of course, involves a challenge by one Robert Laity to the constitutional “natural born Citizen” eligibility of Kamala Devi Harris to serve as vice-president. His petition for a writ of *certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit – which had affirmed the dismissal of his case by the U.S. District Court for the District of Columbia for lack of his “standing” to bring and maintain the action – was denied by the Supreme Court on June 1, 2021.

The denial came without any comment from a Justice by way of either a “statement,” “concurrence” or “dissent” in the form of an “Opinion Relating to Orders.” In particular, there was no statement, concurrence or dissent from Justice Clarence Thomas. One could thus conclude that no Justice, including Justice Thomas, disagreed with any aspect of the denial.

Faithful P&E readers will recall that Justice Thomas has in the past stated – jokingly, according to some – that with regard to the constitutional "natural born Citizen" eligibility question under Art. 2, § 1, Cl. 5 of the Constitution, the Court is "evading that one."

Whether Justice Thomas was "joking" or not – and regardless of whether one views the position of the Court as "evading" the issue or merely "avoiding" the issue awaiting the "right case," – the fact remains that while the Court has mentioned the term "natural born Citizen" many times in other contexts, it has never, to this day, accepted jurisdiction over a case or controversy directly addressing the Art. 2, § 1, Cl. 5 "natural born Citizen" *bona fides* of either a sitting or yet-to-be installed president or vice-president.

While there may be a variety of reasons for this circumstance including, for example, lack of "standing," "separation of powers," "political question" or garden variety "the issue is too radioactive," the fact remains that in the absence of a definitive Supreme Court decision, the question of who can – and more importantly, who cannot – serve as president or vice-president under the Constitution has been sloughed off to the opinions of lower state and federal courts, the Congressional Research Service (more on that later) and a bevy of law professors and former Solicitors General.

If that collection of "authorities" – as opposed to the U.S. Supreme Court itself – is by default to be deemed as having the "final say" on the interpretation of the Constitution's eligibility clause, then the Court, at minimum, should articulate that reality. Lacking that declaration, the issue will continue to surface every four years (or more frequently) into the future.

Following the denial of *certiorari* in his case, Mr. Laity timely filed a "Petition for Rehearing," but as of the Court's "recess" date, July 2, 2021, no action had been taken on the petition. As noted by Chief Justice Roberts in his July 1, 2021 recess announcement, the current term of the Court will be in recess from July 2, 2021 "until the first Monday in October 2021, at which time the October 2020 Term of the Court will be adjourned, and the October 2021 Term of the Court will begin, as provided by law." Stated otherwise, the Court is today only in "recess."

As it turns out, there are additional events which can take place during the recess, including the issuance of "summer order lists." These lists normally address "… actions taken by the Court on motions in pending cases, ***petitions for rehearing*****,** and other miscellaneous matters." (Emphasis added) For the current 2020-2021 Term, those summer order lists are presently scheduled to be released on August 2, 2021, August 23, 2021 and September 10, 2021.

Accordingly, it may be well before the Court's "long conference" in October – as predicted by commenter Wilson here – that the Court takes action on the Laity Petition for Rehearing. The timing of that event aside, the question surfaces: might there yet be another opportunity for one of the Justices – say…, Justice Clarence Thomas – to provide

some much-needed guidance, perhaps even clarity, on the question of the meaning of the "natural born Citizen" restriction in the Constitution?

While the denial of a petition for rehearing following the denial of its related petition for *certiorari* is technically not itself a "summary disposition" of the case at issue – the original denial of *certiorari* constituting that "summary disposition" – there would seem to be no rule precluding the preparation and issuance of a "statement" as an "Opinion Relating to Orders" and confined to the Court's action regarding the petition for rehearing in order to provide guidance on the topic. Indeed, a statement might also issue in the event that the Court grants the petition for rehearing.

Moreover, while such a statement would not constitute a "decision" or "holding" of the Court, but instead would be the personal view of a particular Justice or Justices akin to "dictum" if uttered in a "live" case, at least it would be a "signal" to potential future eligibility challengers possessed of "standing" where that particular Justice (or Justices) stood on the topic.

Stated otherwise, depending on the content of the "statement," and assuming for the sake of argument one were to be issued, it could operate to either (a) dissuade future challenges, or (b) invite future challenges from persons possessed of the requisite standing thus far missing in all past attempts. Your humble servant addressed this issue with regard to the "standing" of former Vice-President Pence here.

In fact, Justice Thomas has authored no fewer than twelve (12) such "opinions relating to orders" in the 2020-2021 Term, including opinions consisting of "statements" as to the disposition of a case, "concurrences" in connection with a grant of *certiorari* and "dissents" with regard to denials of *certiorari*.

Those cases ranged from matters involving states' rights regarding marijuana in Colorado to Chicago's use of eminent domain to the taxation of gambling devices in Oklahoma "Indian Country." But in no instance, lamentably, did Justice Thomas address the substantive eligibility issues raised in *Laity v. Harris.* Indeed, even if such a hypothetical statement addressed only the "standing" issue, it would still contribute to clarification of the presently muddled legal landscape.

Moreover, an argument could be made that the substantive issues raised in the *Laity* case regarding presidential and vice-presidential "natural born Citizen" eligibility are at least as important as whether the exercise by Chicago of the power of eminent domain under *Kelo v. New London*, 545 U. S. 469 (2005) was appropriate. This is particularly so in light of the fact that Justice Thomas, joined by Justice Gorsuch, dissented from the denial of *certiorari* in the *Eychaner* eminent domain case, commenting that the decision in *Kelo* "… was wrong the day it was decided. And it remains wrong today." *See* Thomas dissenting Opinion Relating to Order in USSC Doc. No. 20-1214 at 2.

If, as many would argue, the Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) is, purportedly, dispositive on the presidential eligibility issue, a

statement from a Supreme Court Justice in the nature of an opinion relating to the order of *certiorari* denial in *Laity v. Harris* stating as much would remove a lot of the present uncertainty. Rest assured, faithful P&E readers, your humble servant strongly contends that the *Wong Kim Ark* decision has *nothing* to do with the correct interpretation of Art. 2, § 1, Cl. 5 of the Constitution. But unlike Clarence Thomas, he is not a Justice of the Supreme Court.

There are many who would argue that various decisions of the Supreme Court; of lower federal courts; and of certain state courts – from *United States v. Wong Kim Ark* to *Hollander v. McCain* to *Tisdale v. Obama* to *Ankeny v. Governor of Indiana* – are either wrongly applied to the eligibility question or are flat wrong as a matter of law. And this doesn't even address the "now-you-see-it-now-you-don't" linguistic ellipsis antics of the Congressional Research Service discussed here.

Yet these are the non-Supreme Court "authorities" relied upon to establish "the last word" on one of the core provisions of the Constitution: the "natural born Citizen" restriction of Art. 2, § 1, Cl. 5. Clarification beyond a mere "*certiorari* denied" notification would be a big improvement over what now passes for "settled" law on the issue, regardless of the ultimate ruling on the Laity Petition for Rehearing.

In any event, if any such "opinion relating to orders" in *Laity v. Harris* were to be contemplated, it might well be expected sometime around August 2nd or 23rd, 2021 or perhaps September 10th, 2021. Whether or not Justice Thomas or any other Justice would consider putting pen to paper (or fingers to keyboard) to generate such an opinion remains to be seen and, moreover, it would be unwise to bet the farm on that happening. Nonetheless, even if such a statement resembled dictum, it certainly could not hurt and might actually help bring some clarity and stability to the question.