A Refresher Course on Pure Malarkey

"FLAT WRONG"

by Joseph DeMaio, ©2021

What did the Framers mean by the term "natural born Citizen?"

(Jul. 19, 2021) — Faithful P&E readers, as we wait patiently for the ruling from the Supreme Court on the Petition for Rehearing in *Laity v. Harris*, USSC Doc. No. 20-1503 (don't hold your breath for an order granting the petition…), perhaps it makes sense to take a few moments to once again revisit the foundations of the theory that if a person is a "citizen at birth" or a "citizen from birth" under the 14th Amendment, this means that the person is also a "natural born Citizen" as intended by the Founders in Art. 2, § 1, Cl. 5 of the Constitution, the presidential "Eligibility Clause."

While some might deem this theory to be "misinformation" worthy of being purged from existence, it still persists in the minds of those who believe that Kamala Devi Harris is a "natural born Citizen" eligible to serve as vice-president. Although there are more colorful, colloquial terms to describe this "citizen-at-birth-equals-natural-born-citizen" intellectual anomaly, let us borrow from the Goofball-in-Chief's "No Malarkey" campaign bus: the purported equivalence of a 14th Amendment "citizen" and an Art. 2, § 1, Cl. 5 "natural born Citizen" is not "No Malarkey," but instead is "Pure Malarkey."

Accordingly, faithful P&E readers, consider the following discussion to be a brief "refresher" course in what is – and more importantly, what is not – the "fact-checked" truth underlying the issue because, apart from the question of "standing" in the *Laity v. Harris* case, this concept lies at the core of the substantive question presented in the dispute. Some of the content may seem repetitive, so feel free to skip ahead as necessary.

Caffeinated beverage nearby? Thinking cap in place? Excellent… let us begin.

Malarkey at Work

To begin with, "malarkey" is defined as "insincere or foolish talk." It is not infrequently used to mislead or deceive. And that, faithful P&E readers, is exactly what has occurred with regard to searching for the original intent of the Founders when they crafted the "natural born Citizen" eligibility restriction in the Constitution.

The tsunami of misinformation stretches from the 1898 decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (hereinafter "*WKA*"); to the various "products" of the Congressional Research Service ("CRS") found here and here; to a more recent article published by two former Solicitors General of the United States captioned "On the Meaning of 'Natural Born Citizen.'"

The 2006 Federalist Blog Post

First, the U.S. Supreme Court majority opinion in *WKA* has been described as perhaps "one of the most incompetent and feeble rulings ever handed down by the Supreme Court…." Not exactly high praise for the decision. The just-cited Federalist Blog article – titled "Was U.S. v. Wong Kim Ark Wrongly Decided?" – posits that *WKA* was, as a matter of fact and law, wrongly decided for a wide variety of reasons. Chief among those reasons was the fact that Associate Justice Horace Gray ignored his ***own*** ruling on the meaning of "and subject to the jurisdiction of the United States" under the 14th Amendment which he had earlier handed down in *Elk v. Wilkins*, 112 U.S. 94 (1884).

U.S. Supreme Court Chief Justice Horace Gray (public domain)

The *Elk* case addressed the question of whether an American Indian, John Elk, who was born a Winnebago Indian to tribal member parents on the tribe's reservation, but upon reaching majority, renounced his tribal membership and lived in the Nebraska Territory, was a 14th Amendment U.S. citizen. The Supreme Court, with Justice Gray writing the majority opinion – Justices Harlan and Woods dissenting – held that despite being born in a U.S. territorial area, he was not subject to the "complete jurisdiction" of the United States under the 14th Amendment and remained subject to his tribe's jurisdiction from birth.

Thus, Justice Gray opined that Elk was not a U.S. citizen and was to be denied the right to vote in a municipal election for members of the Omaha city council. Thank you, Justice Gray. Mercifully, Congress abrogated Gray's decision in 1924 by enacting the "Indian Citizenship Act," 43 Stat. 253.

The Federalist Blog post also discusses Gray's refusal to take into consideration the documented legislative history behind enactment of the 14th Amendment, referencing Justice John Paul Stevens's later observation that a refusal to consider reliable evidence of original intent in the Constitution is no more excusable than a judge's refusal to consider legislative intent: both refusals are inexcusable.

Returning to Gray's opinion in *WKA,* only by ignoring *via* a painfully feckless attempt to distinguish his prior *Elk* holding could Justice Gray "fudge" the conclusion that Wong Kim Ark qualified as a person who was purportedly – despite the status of his parents as non-citizen subjects of the Emperor of China – "completely subject" to the political jurisdiction of the United States and owing to the United States "direct and immediate allegiance."

But ignoring inconvenient facts which undercut the desired narrative has rarely stopped a politician – or a judge – from the attainment of a desired outcome. *See*, *e.g.,* Justice Antonin Scalia's dissent in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 646 – 707 (2012) ("Obamacare" held constitutional, with Justices Scalia, Kennedy, Thomas and Alito dissenting).

The Federalist Blog article linked above remains as relevant on the "completely subject" aspect of Gray's *WKA* decision now as it was in 2006 when it appeared. Thus, reading it again would not be a bad idea…, that is, of course, if one is interested in learning the true facts surrounding the *WKA* majority opinion. Yes, Virginia, there is a cogent dissent in *WKA* which should also be read. As is true of all dissents, it maintains that Gray's majority opinion is wrong.

Justice Horace Gray's *WKA* Blunder

Second, Justice Gray's anemic attempt to distinguish his prior holding in *Elk* is actually surpassed in *WKA* when he "erroneously" (some might argue "deceptively") misrepresents that in 1795, Congress re-enacted "in the same words" the "natural born citizens" language it had carelessly used in 1790 to describe the status of children born

"beyond sea" to American citizen parents. No, Virginia, Congress did just the opposite. This anomaly is addressed here.

United States Statutes at Large, Volume 1
United States Congress
Public Acts of the First Congress, 2nd Session, Chapter 3

←Chapter II | Chapter IV→

sister projects: Wikipedia article, Wikidata item

[103]

CHAP. III.—*An Act to establish an uniform Rule of Naturalization*.[1]

March 26, 1790.

Repealed by act of January 29, 1795, ch. 20.
Alien whites may become citizens, and how.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of [104] such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also*, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed.[2]

Their children residing here, deemed citizens.
Also, children of citizens born beyond sea, &c.
Exceptions.

United States Statutes, Naturalization Act of 1790 (Wikisource)

Specifically, as discussed here, in 1790, Congress passed 1 Stat. 103 entitled "An Act to establish an uniform Rule of *Naturalization*" (Emphasis added). Note that this law dealt with the "naturalization" of aliens and foreigners and did ***not*** address the statutory creation of "natural born citizens." Section 1 of the act purported to bestow status as a "natural born citizen" upon the children of American parents born "beyond sea, or out of the limits of the United States…."

However, less than five years later, seemingly realizing that it had improperly attempted to amend the Constitution by a statute – a "no-no" even in 1790 – in 1795, Congress repealed 1 Stat. 103 and on January 29, 1795 passed in its place 1 Stat. 414, with President Washington thereafter signing it into law. 1 Stat. 414, § 3 deleted the words "natural born" before the word "citizens" as it had appeared in 1 Stat. 103. Thereafter, "children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States…." but ***not*** "natural born citizens." Section 4 of the Act repealed, *in toto*, 1 Stat. 103.

Stated otherwise, after January 29, 1795 (or whenever President Washington signed the bill into law), 1 Stat. 103 could no longer properly or authoritatively be relied upon for the proposition that Congress intended that children born to American citizen parents outside of the United States were to be considered "natural born citizens." Between 1790 and 1795, that status may have obtained as to children born to American citizen parents located outside the United States, but thereafter, as they say on the street: "no way." Period.

This "fact-checked" and indisputable reality has nevertheless been nearly universally ignored in the products of the CRS and in the various court opinions purporting to

address and "settle" the "natural born citizen" presidential eligibility issue, including, for example, *United States v. Wong Kim Ark; Tisdale v. Obama*; *Elliott v. Cruz*; and *Ankeny v. Governor of Indiana*.

None…, repeat, ***none*** of these cases addresses the repeal of the "children considered to be natural born citizens" in 1 Stat. 103 by 1 Stat. 414. Indeed, already noted, Supreme Court Justice Horace Gray went so far as to erroneously (some might argue "falsely") misinform readers of the *WKA* opinion that the 1795 statute, 1 Stat. 414, "reenacted, in the same words," the 1790 statute. (Emphasis added). *See WKA*, 169 U.S. at 672-673. Wrong. Flat wrong.

Not only does this, at minimum, wildly misrepresent the import of Justice Gray's spectacular blunder – if not an intentional misrepresentation – the anomaly has also become a part of the faulty foundation upon which rests much of the reasoning Gray uses to manufacture Wong Kim Ark's status as a "citizen" under the 14th Amendment. In the law, this blunder would normally invoke the principle "*falsus in uno, falsus in omnibus*: false in one thing, false in all things." In the common vernacular, it is called "WTH?" or "what the heck?" But since we are here discussing presidential eligibility, that principle is tossed to the curb.

Stated otherwise, if Gray's intellectual stumble is acknowledged for what it is – an obvious misstatement, intentional or not, of what Congress did in 1790 and 1795 – that mistake infects and casts doubt on the entirety of his reasoning and rationale for the conclusion that Wong Kim Ark was properly deemed to be a "citizen by birth" under the 14th Amendment. This, of course, is explained in detail in the Federalist Blog already cited.

Against this indisputable factual backdrop, one might well ask: when, exactly, will the Congressional Research Service, the judges in the *Tisdale*, *Elliott* and *Ankeny* cases and the authors of the Harvard Law Review Forum article "On the Meaning of 'Natural Born Citizen'" concede as much and demand that such "misinformation" be "memory-holed" and banished from public view? Indeed, when will the U.S. Supreme Court do the same?

Do not hold your breath for an answer to those questions, because a candid response could undermine the "settled" party narrative that a "citizen at birth" under the 14th Amendment is incontrovertibly – and do not ***dare*** to contend otherwise – synonymous with a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the Constitution. Can't let that happen…, can we?

The Harvard Article and Senate Resolution 511

Third, the Harvard Law Review Forum article by former U.S. Solicitors General Paul Clement and Neal Katyal – "On the Meaning of Natural Born Citizen" – claims that the term "natural born Citizen" in the Constitution was intended by the Founders to mean anyone born merely "a citizen from birth by descent without the need to undergo

naturalization proceedings….” and whether born here or elsewhere. *See* 161 Harv. L. Rev. For. at 162.

In reaching that conclusion, the authors cite and directly or indirectly rely upon 1 Stat. 103 – the law Congress repealed and jettisoned in 1795 via 1 Stat. 414 – no fewer than five times. *See* 161 Harv. L. Rev. For.at 162, 163 and 164. To their credit, the authors acknowledge the repeal of 1 Stat. 103 in 1795, but one needs to pause in reading the article text to find that unexplained concession buried in a parenthetical reference in footnote 8.

United States Statutes at Large, Volume 1

←Chapter XIX | *United States Congress* | Chapter XXI→

Public Acts of the Third Congress, 2nd Session, Chapter 20

[414]

CHAP. XX.—*An Act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject.*[1]

Jan. 29, 1795

Act of March 26, 1790, ch. 3. Repealed by Act of April 14, 1802, ch. 28. How an alien may become a citizen.

FOR carrying into complete effect, the power given by the constitution, to establish an uniform rule of naturalization throughout the United States:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—

To express his desire of becoming a citizen, and to renounce his former allegiance.

First. He shall have declared on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territories northwest or south of the river Ohio, or a circuit or district court of the United States, three years, at least, before his admission, that it was bona fide, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.

To have certain residence.

To be sworn or affirmed to support the constitution. To renounce former allegiance.

Secondly. He shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he has resided within the United States, five years at least, and within the state or territory, where such court is at the time held, one year at least; that he will support the constitution of the United States; and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a citizen or subject: which proceedings shall he recorded by the clerk of the court.

https://en.wikisource.org/wiki/United_States_Statutes_at_Large/Volume_1/3rd_Congress/2nd_Session/Chapter_20

Nonetheless, by persisting throughout in referring to 1 Stat. 103 as being the contemporary *sine qua non* intellectual guidepost for what Congress intended when drafting Art. 2, § 1, Cl. 5, the article posits that although Congress in 1795 deleted and repealed the specific language of the 1790 statute regarding children born to American citizen parents "beyond sea," it still purportedly intended to thereafter preserve the *concept* – if not the pre-existing statutory authorizing language – that such children remained "natural born citizens." In the law, this illogical tactic is called a "*non sequitur*." In the common vernacular, it is called "dumb."

Moreover, the argument that Congress in the 1795 Act was merely making a "stylistic" change or deleting the language as "surplusage" is belied by the actual legislative history underlying the enactment of 1 Stat. 414, discussed here.

Mr. HILLHOUSE observed, that when the amendment was first introduced, he considered it as altogether harmless and unnecessary; but, being friendly to what appeared to be the object of the mover, that is, keeping out privileged orders from among us, he was inclined to vote for it. Yet, upon more mature reflection, he was of opinion that if the provision contained in the amendment had any effect at all, it would be a directly contrary one from what was intended, and would indirectly establish the principle that privileged orders might be introduced and exist among us, a principle which he wholly rejected and reprobated; and, as he did not doubt that the views of the gentleman who moved the amendment were similar to his own on that subject, he hoped that, upon further consideration, he [Mr. GILES] would withdraw it. It was his opinion that the ground upon which foreigners should be admitted to a share in the administration of our Government ought to be narrowed in every possible way, and if the gentleman would so modify the amendment as wholly to exclude that class of foreigners, or any other, from ever becoming citizens, so far as to elect or be elected to any office, he would most heartily join in giving his vote for it. In those nations where privileged orders are admitted, the benefits and advantages arising from it have been considered as merely local, so that, if a nobleman removes from one nation to another he is not considered as carrying with him the privileges of his order; as, for instance, if a nobleman from any other nation removes to England, where an hereditary nobility is established by law, and even becomes naturalized, he is not a peer of Eng-

them. A nobleman, then, may come to the United States, marry, purchase lands, and enjoy every other right of a citizen, except that of electing and being elected to office. His children, being natural born citizens, will enjoy, by inheritance, his title, and all the rights of nobility and a privileged order which he possessed, an idea which ought not, either explicitly or impliedly, to be admitted.

As to the impression which may be made on the popular opinion, by voting on one side or the other of the present question, Mr. H. felt no anxiety. He had too good an opinion of the understanding and discernment of his constituents, and of the people of the United States, to suppose they would believe him a friend to privileged orders or a nobility, for voting against a proposition which, in his opinion, was at least altogether futile, if not of a tendency directly opposite to what is proposed. Was any gentleman to sacrifice his judgment to an apprehension of losing his popularity, he would most certainly not only merit but meet with their contempt. The people of the United States are not tickled with sounds; they regard the substance.

Mr. J. WADSWORTH rose next. He had been up four times before, but, other gentlemen always rising along with him, he had sat down again. Mr. W. said, that a rage against nobility and privileged orders now pervades the whole world. He really did not see the use of this amendment. It put him in mind of an old law which, within his memory, had been in use. When a man had shot himself, his neighbors were not contented with the certainty of his being dead in this world, and damned in the next, but, besides all this, they

Specifically, the remarks of Congressman James Hillhouse (*see* 4 Annals of Congress, "3rd Congress," 2nd session at 1046) offer a more logical and rational explanation for the deletion. That explanation, as espoused by Congressman Hillhouse, is that in recognition that "the ground upon which foreigners should be admitted to a share in the administration of our Government *ought to be narrowed in every possible way…*" (emphasis added), the removal of the "natural born" modifier found in 1 Stat. 103 would eliminate any question of conflict between the "natural born Citizen" requirements of Art. 2, § 1, Cl. 5 and the "naturalization" powers of Congress under Art. 1, § 8, Cl. 4, consistent with the intent of Congress underlying the 14th Amendment as addressed and explained in the 2006 Federalist Blog post noted above.

Furthermore, the article by Messrs. Clement and Katyal also attempts to support its arguments with a reference to the 2008 "unanimous" resolution of the Senate, S. Res. 511, 110th Cong. (2008). That resolution, addressed and dissected here, purports to declare that former Senator John McCain, born to American military personnel parents in Panama, was a "natural born citizen" eligible to the presidency by virtue of, among other things…: 1 Stat. 103. Really?

On April 10, 2008, the vaunted intellects of the U.S. Senate – including Hillary Clinton and Barack Hussein Obama, Jr. – stated in their resolution that, among other "whereas" assertions, the "First Congress's own statute defining the term 'natural born Citizen' [*i.e.,* 1 Stat. 103] supposedly fortified the resolution. Not so fast.

First, 1 Stat. 103 did ***not*** "define" the term at all: it merely *asserted* via *ipse dixit* something which likely did not comport with either the language or original intent of the Founders in Art. 2, § 1, Cl. 5. Second, adding dumb to dumber, the resolution even

acknowledges that although the term "is not defined in the Constitution of the United States," Congress somehow wields the power to independently and unilaterally supply a "definition" which may or may not correspond to the original intent of the Founders and may or may not depend on the flawed reasoning of the decision in *WKA*. This, faithful P&E readers, is what passes for intelligent governance in Washington, D.C.

Interestingly, two well-respected authorities on the Constitution – Ted Olsen, a former U.S. Solicitor General under President George H. W. Bush, and Harvard law professor Laurence Tribe – submitted a March 19, 2008 joint letter to the Chairman and Ranking Member of the Senate Judiciary Committee (Senators Patrick Leahy and Arlen Specter, respectively) regarding the issue.

In that letter, Messrs. Olson and Tribe opine that Senator McCain was, in their opinion, a natural born citizen eligible to the presidency. And while they cite the decision in *WKA* in support of their conclusion, they omit altogether any discussion of Justice Gray's manifest linguistic blunder or the matters addressed in the Federalist Blog which appeared two years earlier.

Search documents in this case: Search

No. 20-1503	
Title:	Robert C. Laity, Petitioner v. Kamala D. Harris
Docketed:	April 28, 2021
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(20-7109)
Decision Date:	February 5, 2021
Rehearing Denied:	March 18, 2021

DATE	PROCEEDINGS AND ORDERS
Apr 16 2021	Petition for a writ of certiorari filed. (Response due May 28, 2021) Petition Certificate of Word Count Appendix Proof of Service
May 07 2021	Waiver of right of respondent Harris, Kamala to respond filed. Main Document
May 11 2021	DISTRIBUTED for Conference of 5/27/2021.

Conclusion

Accordingly, as we await the Supreme Court's ruling on Mr. Laity's Petition for Rehearing, ponder the wisdom of allowing the determination of who is – and who is ***not*** – a "natural born Citizen" for presidential eligibility purposes to fall upon those who would claim that the language of 1 Stat. 103 still controls the analysis of the question today, 226 years after it was repealed rather than reenacted "in the same words." Does that make any sense at all?

I'll wait.