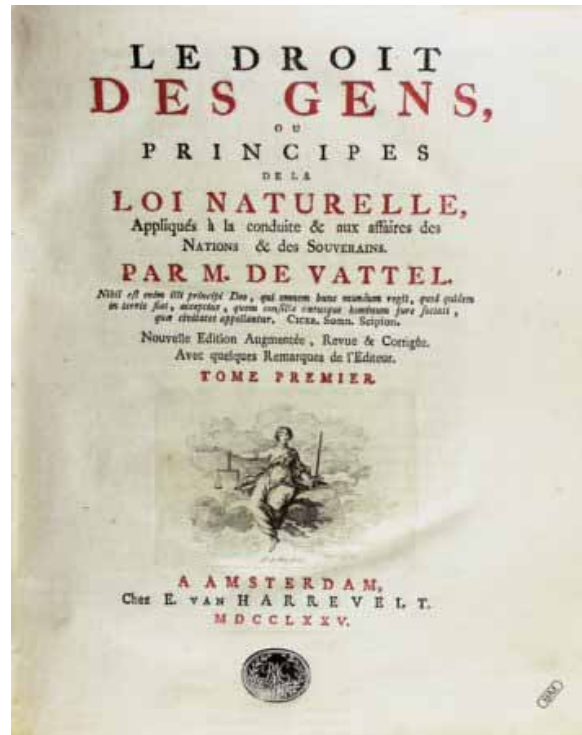


KDH and the 2020 Election Eligibility Roller-Coaster

“THE DE VATTEL OPTION”

by [Joseph DeMaio](#), ©2020



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(Sep. 28, 2020) — Every now and then, commenters here at The P&E present an opportunity to revisit the fundamental issues surrounding the “natural born citizen” eligibility question. Such is the situation at present regarding two commenters addressing this [post](#). That article, in turn, further draws into question the constitutional eligibility of Kamala Devi Harris (“KDH”) – the putative candidate for Vice-President on the Biden-Harris ticket – under the 12th Amendment to the Constitution.

Since your humble servant has on a few prior occasions addressed the issue here at The P&E and offered some comments on the article at issue, two other commenters – Messrs. Disher and St. John – have issued challenges which invite analysis and response. Those challenges are now accepted and accommodated. However, because the following discussion may at times become a bit tedious and convoluted – not to mention lengthy – readers are advised to keep a supply of their favorite caffeinated beverages handy.

Ready? Let us begin by first identifying the challenges and thereafter analyzing them.

Introduction

The Disher challenge posits that since “Kamila [*sic*] Harris was born in Oakland, CA to alien parents who were under the jurisdiction of the United States at the time of her birth...[, t]hat makes her a natural born citizen according to the laws and Constitution of the United states.” [*sic*]. The challenge continues, asserting that “[t]here is not a single court decision that can be used to challenge this statement and multiple decisions support it...” and that “[t]he polls, which have been consistent, show she will become the first female [V]ice [P]resident of the United States.”

The St. John challenge is more sophisticated and has several parts, which parts will be first identified, then analyzed. To begin with, it requests that your humble servant supply “evidence that the Framers used Vattel as a source for the term natural born citizen.” This is interesting, since none of your servant’s prior comments to the post in question had directly mentioned Emmerich de Vattel or § 212 of his 1758 tome, *The Law of Nations* (London Ed. 1760). This suggests that St. John at least read the embedded links in your servant’s comments, which is more than most opposition commenters do.

Second, it asserts that “[w]e know that they [*i.e.*, the Framers, aka the Founders] referenced Blackstone’s Commentaries for legal terms.” This is both true and unsurprising: the Founders examined and relied on *many* sources as they fashioned the guiding document for their constitutional republic, including both Blackstone’s Commentaries and de Vattel’s *The Law of Nations*.

Finally, St. John cites a portion of a legal brief dated February 24, 1795 prepared by Alexander Hamilton. The memo was prepared in connection with the proposed enactment by Congress of a “carriage tax” on pleasure carriages. More specifically, the issue was the distinction on the one hand between “duties, imposts and excises” and on the other hand “taxes.” That portion of the brief quoted by St. John in his comment states: “We also know Hamilton wrote in a legal brief that to finding [*sic*: “find”?] the meaning of terms in the Constitution *we need to look to English law*.” (Emphasis added).

St. John then quotes a portion of Hamilton’s language from the brief – omitting by ellipsis deletion certain language used by Hamilton (sound [familiar](#)...?) preceding the quoted portion – and stating: “... where so important a distinction in the Constitution is to be realized, *it is fair to seek* the meaning of terms in the statutory language of that country from which our jurisprudence is derived.” (Emphasis added)

The language Hamilton used, and deleted in the St. John comment, is: “If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise*, and then must necessarily be uniform and not liable to apportionment; consequently not a direct tax. An argument results from this, though not perhaps a conclusive one: yet... [end of ellipsis].”

All that now remains of the argument is the fragment of a brief given above. The case was *Hylton v. United States*, and is reported at 1 Dallas, 171. The Supreme Court sustained Hamilton’s view, and held unanimously that the tax was an “excise” or

“indirect” tax, and not a “direct” tax, and was therefore constitutional. What that exercise has to do with the question of what the Founders understood “natural born citizen” to mean is obscure, but the St. John comment included it.

The Disher and St. John challenges are now analyzed in separate sections.

The Disher Challenge

At bottom, the Disher challenge is premised (presumably, but a bit hard to tell...) on the erroneous assumption that mere birth in the United States – even where the parents are not citizens, but who are here “under the jurisdiction of the United States” at the time of the child’s birth – makes that child a “natural born citizen.”



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This erroneous assumption, in turn, likely stems from the widely-held misapprehension that the U.S. Supreme Court decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (“[WKA](#)”) so holds and constitutes binding, Supreme Court precedent for that proposition. Respectfully, no, it does not; and no, it is not.

To [reiterate](#), the *sole* issue adjudicated in WKA was whether a child born in San Francisco to two permanent lawful resident alien Chinese parents was a “citizen” under the 14th Amendment to the Constitution.

The 14th Amendment addresses who is (and inferentially, who is not) a “citizen” of the United States. It says nothing about who is or is not a “natural born citizen” under the separate Eligibility Clause of the Constitution, Art. 2, § 1, Cl. 5. The WKA case did *not* – repeat, *did not* – adjudicate Wong Kim Ark to be a “natural born citizen.” Even the author of the 14th Amendment, Congressman John Bingham, understood the limited reach of the amendment and the [distinction](#) between a “citizen” and a “natural born citizen.”

Accordingly, the tangential discussions in the WKA case to “natural born citizens” in other, factually distinguishable contexts are “dicta, pure and simple.” See C. Gordon, “Who Can Be President of the United States: The Unresolved Enigma,” 28 Md. Law Rev. 1, 19 (1968). At the time he wrote his article, Charles Gordon was the General Counsel, U.S. Immigration and Naturalization Service, and Adjunct Professor of Law, Georgetown University Law Center.

While “dictum” appearing in a case may be interesting, it is neither “holding” nor “precedent” and those who contend that WKA “settles” the eligibility question are, respectfully, wrong. Stated more simply, there is no such thing as “binding, precedential dictum.”

The Disher comment that “there is not a single court decision that can be used to challenge this statement and multiple decisions support it...,” is refuted by the WKA decision itself. Moreover, to the extent that the decision in [Minor v. Happersett](#), 88 U.S. 162, 167-168 (1875), *abrogated by the 19th Amendment* (1920), strongly intimates that, for female suffrage purposes, a native-born “citizen” under the 14th Amendment is *not* the equivalent of a “natural born Citizen” for presidential eligibility purposes under Art. 2, § 1, Cl. 5 of the Constitution, it pours additional cold water on the Disher contention.

And as for the contention that “multiple decisions support [the contention that WKA controls the analysis],” the only *state court* appellate case directly addressing the issue on the merits – and a poorly reasoned one at that – is [Ankeny v. Governor of State of Indiana](#), 916 N.E.2d 678, 688 (Ind. App., 2009). The intellectual shortcomings of that Iowa Court of Appeals – ahem, not the U.S. Supreme Court – decision are addressed [here](#).

Additionally, the argument that [Hollander v. McCain](#), 566 F.Supp.2d 63 (D.N.H. 2008) supports the Disher contention is in error. In dismissing the “natural born citizen eligibility” complaint against then-Senator John McCain, the court stated at the outset: “[T]he court rules that Hollander lacks standing to bring this action. The court *does not reach* the rest of the parties’ arguments, *including, most notably, the question of McCain’s constitutional eligibility to be President.*” (Emphasis added). Similarly, the eligibility claims in *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011) were dismissed “... for lack of Article III standing.” 664 F.3d at 786. Dismissals for lack of standing do not constitute rulings on the merits.

Finally, Disher comments that “[t]he polls, which have been consistent, show she [*i.e.*, Kamala Harris] will become the first female [V]ice [P]resident of the United States.” That statement constitutes, in legal parlance, *ipse dixit*: “it is so because I say it is so.” Much like legal dictum – side comments by a court or a judge not directly material to or legally controlling on the issue being addressed – are not binding precedent, so too are *ipse dixit* comments not binding.

Again, just as there is no such animal as “binding precedential dictum,” so too is there no species as “binding precedential *ipse dixit*.” Recall that on November 7, 2016, the day prior to the 2016 general election and President Trump’s victory, “the polls” were still

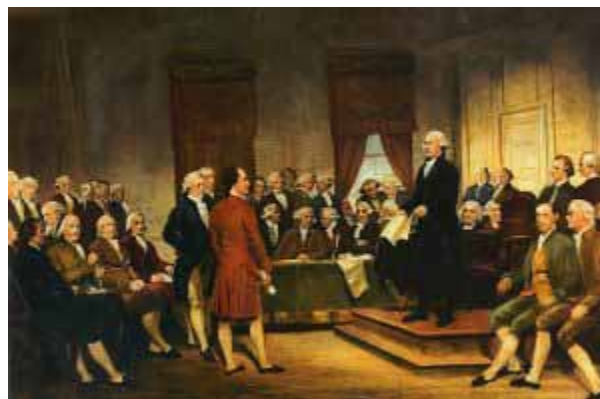
propagandizing that Hillary (“BleachBit... What BleachBit?”) Clinton would be the first female cobra... oops..., my bad..., I mean President of the United States. How’d that work out for ya, Hillary? Or perhaps better stated: “Is that still not working out too well for ya, Hil?” Remember, Hil, time heals all wounds, so chin up. No..., no..., the other one.

The St. John Challenge

The first point raised in the St. John challenge is a request that your humble servant supply “evidence that the Framers used Vattel as a source for the term natural born citizen.” In response, reference is first made to the prior analysis in the Disher challenge section.

Although there is no current direct evidence that, for example, George Washington responded by letter to John Jay seeking confirmation that Jay’s July 25, 1787 “hint” letter intended to rely on § 212 of the de Vattel tome regarding what a “natural born citizen” meant to him, there is a lot of anecdotal, circumstantial and corroborative evidence leading to that conclusion, as discussed above and hereafter.

Not discussed in the Disher section, but nonetheless relevant as circumstantial evidence, is the series of Congressional Research Service (“CRS”) reports and memoranda seeking to undermine the Founders’ familiarity with the de Vattel treatise and, indeed, suggesting that there was no way the Founders could have contemplated the concept of a “natural born citizen” as discussed by de Vattel since, purportedly, no French-to-English translation of the term “Les naturels ou indigenes” in the document existed in 1787 at the Constitutional Convention. *See* November 14, 2011 [CRS Report R42097](#) at 22, Nov. 14, 2011.)



Apart from the fact that an English translation of de Vattel’s [tome](#) was published in London in 1760, 27 years prior to the Constitutional Convention in Philadelphia, many, if not all of the Convention delegates in 1787 understood French. Moreover, as Benjamin Franklin noted when [thanking](#) Charles-Guillaume-Frédéric Dumas for a copy sent to him, the book “came to us in good season, when the circumstances of a rising State *make it necessary to frequently consult the law of nations...*,” adding that the treatise “*has been continually in the hands of the members of our Congress now sitting.*” (Emphasis added).

Despite these irrefutable facts, the 2011 CRS Report dismisses *in toto* even the potential that the “natural born citizen” concepts of § 212 de Vattel’s work had anything to do at all with the Founders’ intent in placing into the Constitution the “natural born Citizen” eligibility requirement.

For example, the report makes much ado over the fact that, at the time of the Constitutional Convention in 1787, there was, purportedly, no French word or phrase equating with “natural born Citizen” and that therefore, the Founders, in using the term, must have meant to adopt the “analogous” term “natural born *subject*” from the English “common law.”

Please, spare me the nonsense that the terms are “close enough” to permit their treatment as synonyms. Rumors persist that this argument was the origin of the observation that some task or product is “close enough for government work.” One is reminded of what Mark Twain said about “almost” similar words, particularly in the context of a new constitutional republic as opposed to a monarchical liege-subject relationship in England. Twain [noted](#): “The difference between the almost right word and the right word is really a large matter – it’s the difference between the lightning bug and the lightning.”

The CRS 2011 Report argues that the French terms “Les naturels ou indigenes” as appearing in de Vattel’s original work in French could not, at least in 1787, be accurately translated as the equivalent of “natural born Citizen.” The problem with that analysis, however, is that it ignores the words *following* that phrase, and whether evaluated in French, English or even Swahili.

Specifically, and without regard to what the proper translation of “naturels” or “indigenes” may be, de Vattel explains that whatever meaning one assigns to those terms, collectively they mean “... sont ceux qui sont nés dans le pays, *de parens citoyens*...” (emphasis added) or, in English: “are those who are born in the country, *of citizen parents*.” (Emphasis added).

This reality has more relevance to the question of whether a natural born citizen necessitates two citizen parents, a mother and a father. Whether denominated a “naturel,” an “indigene,” a “natural born Citizen” or a parrot, the entity at issue – in order to match its antecedent – needed to be born in the country to parents (plural) who also were citizens.

Labels and debatable nomenclature aside, that *concept* is the crux of § 212, so that, whether one is called “natural born,” “indigenous” or something else, in order to qualify as such, one needed to be born in the country where *both* parents – particularly the father – were also, at the time of birth, citizens. This concept, of course, has particular relevance to the KDH situation, as it is undisputed that at the time of her birth in Oakland, California, her father was a citizen of Jamaica and not a citizen of the United States.

This is the concept understood by the Founders, and it is the one they adopted when following up on Jay’s “hint” that, as noted by de Vattel, only someone born to two

parents who are at the time of birth already citizens of the country where the birth occurs are properly defined as “natural born citizens.”

In addition, the 2011 CRS Report ignores the seventh and final sentence of § 212, which reads in French thusly: “Je dis que pour être d’un pays, il faut être né d’un père citoyen; car si vous êtes né d’un étranger, ce pays sera seulement le lieu de votre naissance, sans être votre patrie.” Translation: “I say that in order to be of the country, it is necessary to be born of a citizen father; for if [you] are born there of a foreigner, *it will be only the place of your birth, without being your country.*” (Emphasis added)



Kamala Harris U.S. Senate website)

Later English translations have altered the colloquial “second person” language of the original (*i.e.*, “you” and “your”) to “third person” generic (*i.e.*, “one,” “he” and “his”). But there is no alteration of the substantive import of the seventh and final sentence: if a person is born in a country to a father who is in that country as a foreigner, and not as a citizen, then the country is only the place of the person’s birth and cannot properly be deemed to be the person’s country, since the person’s country, wherever that may be, is that of the foreign father, whether the father be Peruvian, Japanese, Kenyan.... or, as in the case of Kamala Devi Harris, Jamaican.

If § 212 were a statute (concededly, it is not), in construing and determining the underlying intent, it would be subjected to certain rules of interpretive construction. One such rule requires that the “statute” be read as a whole, rather than as a collection of unrelated, disassociated words, in order to glean the overall intent of the drafters.

If that principle were to be applied here – an action seemingly both “foreign” as well as “alien” to the CRS – there could be little question that, quite apart from nuances in the definitions and/or translations of such of the terms “naturels,” “indigenes” “citoyen” and “natural born citizen,” the core *content* and *intent* to be gleaned from de Vattel in § 212 was to convey the principle that *only* if a person’s father were already a citizen of the

nation where the person was born could that person be deemed to be “of” that country. Otherwise, “...ce pays sera seulement le lieu de votre naissance, sans être votre patrie: the country will be only the place of your birth, not your country.”

Furthermore, while the 2011 CRS Report seeks to make the case that England’s “common law,” as articulated by Sir William Blackstone, must be the prime if not exclusive foundation for examination of the meaning and intent of the Founders and to the exclusion of de Vattel, any objective examination of the *entire* backdrop of circumstances existing when the Constitution was being drafted in 1787 must allow for the operation of de Vattel’s teachings.

More to the point, as to the present St. John challenge, since it is undisputed that Kamala Harris’s father was a citizen of Jamaica and not a U.S. citizen at the time of her birth in Oakland, California – the citizenship status of her mother, Shayamala Gopalan aside – under the definition of a “natural born citizen” set out in the treatise that according to Founder Benjamin Franklin was “continually in the hands of the members of our Congress now sitting...,” it is a safe bet that the Founders meant to preclude persons such as Harris from being eligible to the presidency. And following ratification of the 12th Amendment in 1804, that preclusion was carried forward as to the Vice-President.

As part of the argument that the source for the Founders’ use of the term “natural born citizen” might be found elsewhere than in the de Vattel treatise, the St. John challenge also asserts that “[w]e know that they [*i.e.*, the Framers] referenced Blackstone’s Commentaries for legal terms.”

Fine. Perhaps one could venture a guess as to how many times in the Blackstone compendium’s (a) four sections of the Introduction; (b) four Books; (c) 110 Chapters; (d) five Appendices; (e) one Supplement; and (f) one Index can be found the term: “natural-born citizen.” Save your time: the answer is zero. Nada. Goose egg.

And yet, despite the complete absence of the term “natural born citizen” in Blackstone’s Commentaries – which, according to the St. John challenge, the Founders referenced for “legal terms,” – miraculously, John Jay used that very term in his letter to George Washington “hinting” that only a “natural born Citizen” should be eligible to the presidency.



John Jay

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Of course, the term “natural born *subject*” appears numerous times in Blackstone, but the notion that Founding Father John Jay (yes, Virginia, he was of the XY chromosome gender) would suggest to George Washington that only a “natural born subject” – owing allegiance to an English monarch – should be president defies all logic and, moreover, is just plain dumb.

Again, spare me the nonsensical argument that the term “natural born subject” is “close enough” to “natural born citizen” to justify the importation and imposition of British laws and Blackstone’s ruminations onto the founding document for a brand new *non-monarchical* constitutional republic. That argument is – let us be polite here – bologna soup, or some colloquial abbreviation thereof.

The St. John challenge next refers to a legal memorandum written by Alexander Hamilton dealing with questions about whether a carriage tax was a “direct tax” or instead an “excise” or “indirect tax.” Hamilton was plainly referencing British law with regard to the meaning of the term “excise” having nothing to do with what a “natural born citizen” was. The St. John challenge seems to posit under its “close enough” theory that if, for example, Hamilton had been seeking the meaning of the term “exercise” for a U.S. health law, he could properly look to a British legal definition of “excise” to accomplish his goal because they sound very similar.

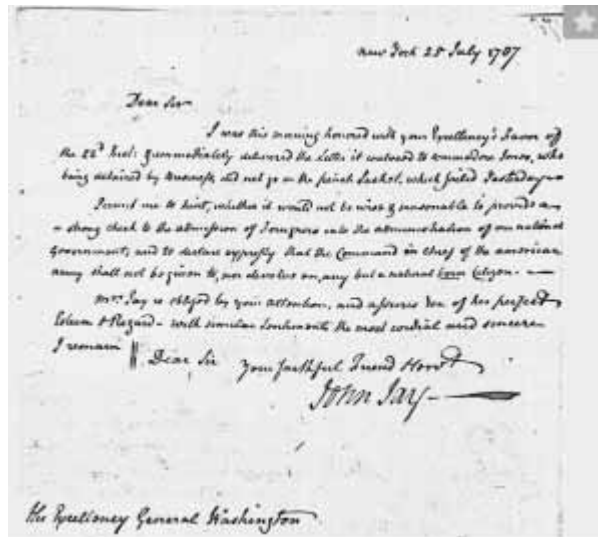
Nonetheless, the St. John challenge argues that the Founders looked to Blackstone and that the quote from Hamilton somehow translated into a mandate that “We also know Hamilton wrote in a legal brief that to finding [*sic*: find?] the meaning of terms in the Constitution *we need* to look to English law...,” (emphasis added), implying some sort of a preferred or mandatory directive.

Hamilton intimated nothing of the sort: the Hamilton quote merely said that “it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.” This is nothing more than a statement that it would be prudent

to see if British legal term might be helpful in resolving an American question. However, any suggestion that, somehow, after (a) a Declaration of Independence; (b) a Revolutionary War; and (c) a Constitution specifically jettisoning the “liege-subject” relationship that had theretofore existed between persons of the United States and the king or queen of England, British law still “controlled” how legal terms would be interpreted in America is irrational.

Indeed, Blackstone [defines](#) a “natural born subject” as one born in England and owing *permanent* and *undivided* allegiance to the king or queen of England. See Blackstone’s Commentaries, Book 1, Ch. 10, p. 358: “As therefore the prince [*i.e.*, the reigning sovereign] is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and *permanent*.” (Emphasis added). If Blackstone’s definition of a “natural born subject” had been intended by the Founders to be a part of the Constitution, then the Declaration of Independence, the Revolutionary War and the document itself would have been a nullity, void ab initio or, as they say on the street: dead on arrival.

Hmmmm... so if the term “natural born citizen” does not appear anywhere in Blackstone’s Commentaries, the Founders’ purported “go to” source for legal terms; and it wasn’t in the [Articles of Confederation](#) (save your time..., your humble servant has already checked...); and it didn’t appear in the pages of *The New York Times*, which was not in existence in 1787..., where, pray tell, did John Jay come up with *that precise term* when he included it in his July 25, 1787 “hint” letter to George Washington?



now Sent 25 July 1787

Dear Sir

I was this morning honored with your Excellency's favor of the 23^d inst: your politeness delivered the letter it inclosed to Commodore Boscawen, who being detained by business did not go to the Spanish Larkel, which failed yesterday

I would not have been so bold as to send you a strong check to the admission of Foreigners into the administration of our national Government, and to desire expressly that the Command in Chief of the American Army shall not be given to, nor devolve on, any but a natural born Citizen.

But I am oblig'd by your attention, and express me of the perfect Obedience & regard with which I submit to the most cordial and sincere

I remain
Dear Sir your faithful Servant
John Jay

The Excellency General Washington

Wait... wait... I think I have it: how about § 212 of Emmerich de Vattel’s *The Law of Nations* (London Ed. 1760)? That July 25, 1787 letter from Jay to Washington is where Jay requested that Washington “permit” him to “hint” that the presidency be restricted exclusively to a “natural born Citizen.” The second paragraph of the letter states, *in toto*:

“Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to

declare expressly that the Command in chief of the American Army shall not be given to, nor devolved on, any but a natural *born* Citizen.”

Moreover, the fact that the Founders were intimately familiar with de Vattel and his work – and more importantly, relied upon its contents and reasoning in drafting the Constitution – was confirmed by the U.S. Supreme Court in [*United States Steel Corp. v. Multistate Tax Commission*](#), 434 U.S. 452, 462, n.12 (1977), with Justice Powell for the Court quoting from Dr. Franklin’s letter to Mr. Dumas. And the continuing vitality of de Vattel as being the “international jurist most widely cited in the first fifty years following the Revolution,” as noted by the Supreme Court in its *Multistate Tax Commission* case, was recently again carried forward by the Supreme Court in [*Franchise Tax Board of California v. Hyatt*](#), ___ U.S. ___, 139 S. Ct. 1485, 1493 (2019).

Long story short: there is *ample* evidence, anecdotal and otherwise, that the Founders knew and understood the difference between a “natural born subject” – an individual born into a permanent liege-subject bondage, as described by Blackstone – and a “natural born citizen” – an individual born to two parents who at the time of birth were already citizens of the country of birth – as articulated in § 212 of the de Vattel treatise. The Founders seem clearly to have selected the de Vattel option.

Conclusion

Thus ends the present tutorial on why Kamala Devi Harris is almost certainly not eligible to the presidency under Art. 2, § 1, Cl. 5 of the Constitution and thus, also ineligible to the vice-presidency under the 12th Amendment. The phrase “almost certainly” is used in recognition that your humble servant is not a Justice of the U.S. Supreme Court and that until that Court accepts jurisdiction over a ripe, live “case or controversy” placing the issue squarely before the Court on the merits, the issue will remain unresolved.

Only a constitutional amendment clarifying the meaning of the Eligibility Clause or a decision of the Court will end these spirited, yet largely academic, debates. They are fun..., but there is too much at stake for the nation to suffer even the *potential* for a third usurpation of the presidency to allow for much more amusement of this sort.

Vote carefully this coming November... very carefully.