Kamala Devi Harris vs. the 12th Amendment

"RIPE FOR ADJUDICATION"

by Joseph DeMaio, ©2020

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(Aug. 13, 2020) — OK, faithful P&E readers, buckle up, because here we go again on that super-duper, stomach-churning, mind-bending roller coaster ride called: eligibility as a "natural born Citizen" under the Constitution. However, unlike the prior experience dealing with the issue only from the perspective of the presidency under Art. 2, § 1, Cl. 5 and involving the Second Usurper in Chief ("SUC"), Barack Hussein Obama, Jr., we will now be treated to the eligibility trip under the 12th Amendment as to one Kamala Devi Harris.

Unless you have been living under a rock, you know by now that Ms. Harris has been selected by (purportedly) Slow Joe Biden as his running mate on the "Biden-Harris" ticket for the offices of President and Vice-President of the United States. Or, given the circumstances, perhaps that effort is better labeled as the "Harris-Biden" ticket…, if you get my drift.

The one glaring problem burdening Slow Joe's selection of Harris as his running mate is that she is very likely ineligible to serve as Vice-President because she is not a "natural born Citizen" as contemplated and understood by the Founders and as required by the 12th Amendment to the Constitution.

The categorical restriction that only a "natural born Citizen" can be president is set out in Art. 2, § 1, Cl. 5: "No Person except a natural born Citizen, or a Citizen of the United

States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States." That provision has remained unchanged since 1787.

Insofar as Ms. Harris is concerned, the 12th Amendment to the Constitution, adopted in 1804, provides that: "… no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." Thus, unless she can prove that she is a "natural born Citizen" otherwise eligible to the presidency, she is also ineligible to the vice-presidency.

The fact that Ms. Harris is likely ineligible to either the office of the President or the Vice-President has been noted and discussed many times in the past at The P&E, not only by your faithful servant here and here, but by many others – including the intrepid P&E Editor – as seen here, here and here.

As a very brief refresher course, all of these posted observations are premised on the circumstance that, at the time of her birth in Oakland, California – Oct. 20, 1964 – neither her father nor her mother was a U.S. citizen. While both her mother and father may have later become naturalized U.S. citizens, that post-1964 change in citizenship was insufficient to retroactively transform their daughter from a "citizen" into a "natural born citizen."

In 1964, her mother, Shyamala Gopalan, was a citizen of India and her father, Donald J. Harris, was a Jamaican citizen. Indeed, her own birth certificate confirms these facts. Moreover, because neither of her parents following their respective lawful emigrations to the United States – Shyamala from India in 1962, Donald from Jamaica in 1963 – were here as resident aliens for the requisite 5 years to allow for their naturalizations, it is clear that neither of them were U.S. citizens in October, 1964.

Thus, under § 212 of Emmerich de Vattel's 1758 tome *The Law of Nations* – a treatise upon which the Founders "continually relied" in drafting the Constitution (*see Franchise Tax Board of California v. Hyatt*, __ U.S. __, 139 S. Ct. 1485, 1493 (2019) and *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n. 12 (1978)) – Harris does not meet the definition of a natural born citizen.

While that should be the end of the dispute, naturally, those who would marginalize and lampoon the "birthers" and "eligibility-deniers" have different ideas, relying on "birthright citizenship" theories to reverse-engineer the faux eligibility of otherwise ineligible candidates for the offices of President and Vice-President. The claimed sufficiency of "birthright citizenship" for eligibility purposes regarding Ms. Harris has already been put in motion, festooned, of course, with the slander that those who would have the temerity to disagree are racists. Flat wrong, of course…, but sign me up anyway.

Section 212 of the de Vattel tome is long, but its full text is important. It states: "The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. *The natives, or* ***natural-born citizens, are those born in the country, of parents who are citizens****. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their* ***fathers****, and succeed to all their rights.* The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. ***The country of the fathers is therefore that of the children****; and these become true citizens merely by their tacit consent.* We shall soon see, whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, ***in order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a foreigner, it will be only the place of his birth, and not his country.***" (Emphasis added)

Therefore, under this definition, while Kamala Devi Harris is no doubt a 14th Amendment U.S. "citizen" as a result of being born in Oakland, California – at a point in time prior to its threatened secession from the United States – she is not a "natural born Citizen" as the Founders understood the term when drafting the Constitution. Thus, she also would be ineligible to hold the office of Vice-President, even if Slow Joe were to be elected president.

Faithful P&E readers, note also that any time you see arguments claiming that "birthright citizenship" (*i.e.*, citizenship arising solely because of birth in the United States, so-called "*jus soli*" citizenship) is sufficient to meet the Constitution's "natural born Citizen" eligibility criterion as contemplated and understood by the Founders as they drafted Art. 2, § 1, Cl. 5 …, run – do not walk – in the opposite direction.

Similarly, whenever you see citations to the U.S. Supreme Court decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) and/or the Iowa Court of Appeals decision in *Ankeny v. Governor of State of Indiana*, 916 N.E.2d 678 (Ind. App., 2009) as also, purportedly, confirming the legitimacy of "birthright citizenship" as being synonymous with status as a "natural born Citizen" under the Constitution, laugh out loud.

The irrelevancy of the decision in *WKA* to the proper resolution of the presidential eligibility question as well as the rookie errors of the Iowa Court of Appeals in the *Ankeny* opinion are addressed here. The *Ankeny* decision was never appealed beyond Iowa, so the U.S. Supreme Court never had the opportunity to correct its errors.

Recall as well, faithful readers, that the vast majority of cases filed in the past challenging the SUC's eligibility ended up being dismissed or denied on the grounds that the plaintiff(s) lacked the necessary "standing" to maintain their action. The SUC paid *big* bucks to a wide array of law firms scattered across the country to file motions to dismiss those "eligibility" challenges, with virtually all of the motions granted.

After all, when the repository of the "nation's best thinking" – the Congressional Research Service ("CRS") – has multiple times opined that "birthright citizenship" under the 14th Amendment is "good enough" to meet the Art. 2, § 1, Cl. 5 standard, why waste time and money challenging those opinions? Surely they must be correct, being the product of the "nation's best thinking" … right…? Right?

With due respect: no, not right, as discussed (among other places) here.

Again, there is no U.S. Supreme Court decision which has directly addressed and opined on the Constitution's "natural born Citizen" clause in the context of (a) a sitting president or vice-president, or (b) actual candidates for those offices.

Several cases advert to the "concept" of who is, and who is not, in a generic sense, a "natural born citizen," including *WKA* (favored by the "birthright citizenship" crowd) and the favorite of those relying on de Vattel's § 212, *Minor v. Happersett*, 88 U.S. 162 (1875). But neither of those cases – nor any others decided by the Supreme Court – *directly* addresses the natural born citizen issue in the context of a sitting president or vice-president or actual candidates for those offices.

Accordingly, and quite apart from the legal questions involved, the real problem here may be the task of finding anyone with (a) the requisite "standing" or "stake in the outcome" of a "ripe" "case or controversy" who is also (b) possessed of the intellectual arsenal and intestinal fortitude to file a court challenge to Ms. Harris's candidacy based on her constitutional ineligibility. Eligibility lawsuits are not for the faint of heart or the uncourageous.

Who, you may ask, might have the requisite "standing" to articulate a live "case or controversy" with the necessary "ripeness" to raise the eligibility question as to Ms. Harris? Answer: Michael Richard Pence, also known as the Vice-President of the United States. Interested? Read on.

First, Vice-President Pence, as the sitting Vice–President, clearly has a tangible and immediate "stake in the outcome" of the upcoming election. If the Harris-Biden ticket wins, he will be out of a job. Moreover, if Ms. Harris is in fact ineligible under Art. 2, § 1, Cl. 5 via the 12th Amendment, that circumstance should be brought to the attention of everyone before November 3, 2020. Clearly, the issue is "ripe" for adjudication.

Second, Vice-President Pence is on record as agreeing with President Trump's exploration of an executive order to curb the bestowal of "birthright citizenship" under the 14th Amendment – the cornerstone of the decision in *WKA* – with regard to illegal aliens. The issue of birthright citizenship as to illegal aliens is not that different or far removed from the issue of the illegal usurpation of either the presidency or the vice-presidency for violation of Art. 2, § 1, Cl. 5 of the Constitution or the 12th Amendment.

Third, however, President Trump is now on record as stating as to the SUC: "Obama was born in the United States…, period." The "birthright-citizenship-is-good-enough" cabal

will point to that statement as proof that any action by Vice-President Pence challenging Ms. Harris's eligibility would be inconsistent with President Trump's recognition that the SUC was born here. Oh, and racist to boot.

That cabal position, of course, ignores the fact that at least as to the understanding of the Founders premised on § 212 of de Vattel's work, mere birth in the United States alone is *not* determinative of the question. President Trump likely does not even know of § 212 and the additional requirement of U.S. citizenship in the parents at the time of a person's birth as impacting upon whether the person is – or is not – a "natural born Citizen" as contemplated by the Founders.

Thus, even if his conclusion as to the SUC is accepted as correct (and it may well be incorrect, as discussed, among myriad other places, here), that is not the end of the inquiry. Stated otherwise, so what if the SUC was actually born in Honolulu in 1964? His "birth certificate" itself demonstrates that his father was not a U.S. citizen when he was born. Period.

The bottom line here is simple: Vice-President Pence (and his boss, of course) should seriously consider filing an action drawing into question the constitutional eligibility of Kamala Devi Harris. Most of the prior "eligibility" lawsuits have sought the court-ordered removal of a claimed-ineligible candidate from the ballot or an injunction preventing a secretary of state from placing such a person's name on the ballot in the first place.

In this case, perhaps something as innocuous as a "declaratory judgment" action seeking a judicial determination of whether Kamala Devi Harris is, as a matter of fact and law, a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the Constitution, would suffice. Is there the courage in the Trump Administration to undertake such a bold and potentially controversial task? Time and, of course, pre-election polling will tell.

Finally, taking a cue from former Ambassador Alan Keyes and his experience in *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), Vice-President Pence should not wait too long to bring the action, if at all. As Dr. Keyes learned, if one files the lawsuit after the "horse is out of the barn," the lawsuit will be in all likelihood dismissed as untimely and moot.

In the *Drake* case, Mr. Drake and Mr. Keyes had challenged the constitutional eligibility of the SUC in the 2008 general election. The Ninth Circuit panel (Judges Pregerson, Fisher and Berzon…, about as left-leaning a panel as might be assembled, even in that circuit) ruled that, although Mr. Keyes possessed at one time "competitive standing" (*i.e.*, standing to be in court as a candidate-competitor of then-Senator Barack Obama and possessed of the "potential loss of an election" to satisfy the "injury in fact" requirements for standing), that standing was lost as soon as Mr. Obama was sworn into office on January 20, 2009.

The panel concluded that since Mr. Keyes's amended complaint was not filed until after that time (*i.e.*, July 14, 2009), he was at that time no longer a "candidate for the 2008

general election." The Ninth Circuit panel apparently had not heard of the "relation-back" doctrine set out in Rule 15(c) of the Federal Rules of Civil Procedure. Thus, Mr. Keyes was, as we say, "simply out of luck."

If Vice-President Pence does not move soon and swiftly, like Mr. Keyes, he may find himself similarly out of luck. Stay tuned, faithful P&E readers… stay tuned.

Oh…, and vote very carefully in November.