

# Laity v. Harris: A Hypothetical Amicus Curiae Brief

"A SUBSTANTIVE QUESTION"

by [Joseph DeMaio](#), ©2021

U.S. citizen "at birth," and in *dicta* in the case indicated that such person is eligible to be President of the United States. The Court explained that even if that person's parents move back to their country of origin with their child, and obtain citizenship for that child in the foreign country, such a U.S. citizen "at birth" who returns or intends to return to the United States by the age of majority remains a "natural born citizen" of the United States. Citing with approval an opinion of the Attorney General, the Supreme Court explained that such a citizen returning to the United States would qualify to be President:

One Steinkauler, a Prussian subject by birth, emigrated to the United States in 1848 ... and in the following year had a son who was born in St. Louis. Four years later Steinkauler returned to Germany taking this child and became domiciled in Weisbaden where they continuously resided. ... On

<sup>48</sup> See, e.g., *Donofrio v. Wells*, No. 08A407, Application for Emergency Stay to the United States Supreme Court, contending that "candidate Obama is not eligible to the Presidency as he would not be a 'natural born citizen' of the United States even if it were proven he was born in Hawaii, since ... Senator Obama's father was born in Kenya and therefore, having been born with split and competing loyalties, candidate Obama is not a 'natural born citizen' ..." See also *Berg v. Obama*, *supra* at 513.

<sup>49</sup> *Fong Kim Ark*, *supra* at 674-675; *Perkins v. Elg*, *supra* at 329, 334, Fourteenth Amendment, Sec. 1, and 8 U.S.C. § 1401(a).

<sup>50</sup> *Hollander v. McCain*, 566 F.Supp.2d 63, 66 (D.N.H. 2008).

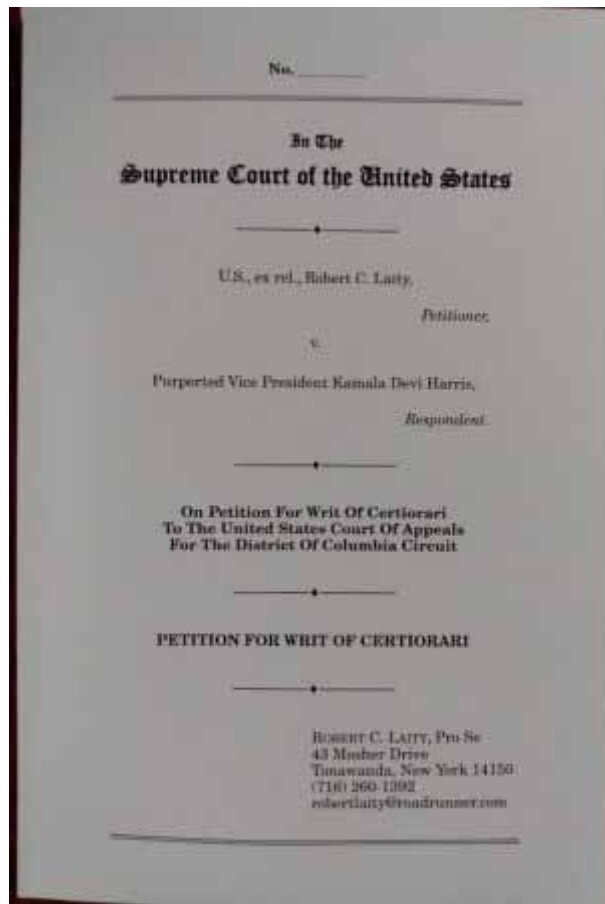
<sup>51</sup> *Perkins v. Elg*, *supra* at 329. Note also that Chester A. Arthur, 21<sup>st</sup> President of the United States, was apparently born in the United States (although rumors were rife that he was born in Canada) in 1829 to a U.S. citizen-mother and a father who was not a U.S. citizen, but rather a citizen of Ireland and a British subject, although it is not clear that this fact was generally or widely known at the time. (See indication of "naturalization" of Arthur's father in 1843. Library of Congress, microfilm file reproduced at <http://www.scribd.com/doc/11067180/William-Arthur-father-of-President-Chester-Arthur-Naturalization-certificate-1843-Congress>.)

[April 3, 2009 CRS memo, page 13](#)

(May 9, 2021) — Rule 37 of the U.S. Supreme Court Rules deals with *amicus curiae* briefs. Rule 37(1) states, in relevant part: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."

As originally contemplated, and as the name suggests, an "*amicus curiae*" was a "friend of the court." The true original *amicus* was neither a friend of the appellant/petitioner nor the appellee/respondent: it was instead a friend of the Court, intent upon bringing to its attention issues and matters which had not been presented by the parties, but which might nonetheless be relevant to the Court's deliberations and analyses. In addition, as noted in the rule, *amicus* briefs that deviate from this goal burden the Court and are "not favored."

Which brings us, of course, to the petition for *certiorari* presently pending in the U.S. Supreme Court, captioned "Robert C. Laity, Petitioner v. Kamala D. Harris, Respondent," USSC Docket No. 20-1503. That petition seeks a substantive decision by the Court adjudicating that Kamala Devi Harris, now occupying the Office of the Vice-President of the United States, is ineligible to hold the office. The claim is that she is usurping the office because she is not, as posited in the *certiorari* petition, a "natural born Citizen" as contemplated under Art. 2, § 1, Cl. 5 of the Constitution and thus, disqualified by operation of the 12<sup>th</sup> Amendment to the Constitution.



Mr. Laity filed his petition on April 16, 2021 and the case was “[docketed](#)” (*i.e.*, entered into the Court’s filing and tracking system) on April 28, 2021. Under the rules, Harris’s lawyers had until on or before May 28, 2021 to file a response. However, under the rules, a party – here, Kamala Harris – can decline or “waive” any response, which then results in the petition being immediately sent by the SCOTUS Clerk to the full Court for “consideration.”

On Friday, May 7, 2021, just such a waiver was [filed](#) on behalf of Harris. Assuming that the rules are being followed, the next opportunity for a formal “consideration” of the Laity petition will likely occur at the next scheduled conference on Thursday, May 13, 2021.

Accordingly, if there are any “relevant” issues or matters which have not yet been brought to the Court’s attention, those issues or matters are best presented to the Court sooner rather than later. If they are presented after the case is dismissed, as could occur, they will be disregarded as being moot. Those matters include ones which might assist the Court in determining first, if Mr. Laity has the requisite “standing” to maintain his action, and second – assuming he can hurdle the first obstacle – what matters not yet brought to the Court’s attention might bear on the substantive question of whether Kamala Devi Harris is – or is not – a “natural born Citizen” as contemplated by the Founders and thus, whether she lawfully occupies the office of the Vice-President.

To begin with, one of the core principles of Supreme Court decisions addressing the “standing” issue is that a “generalized” claim of injury in fact, shared or endured by the

populace at large, is insufficient. One must possess a “particularized injury” in order to have “requisite standing.” And yet, if “everyone” has suffered the same wrong, why does not everyone possess the same, individually-particularized injury? Stated otherwise, if all are injured, is anyone not injured?

The purpose of this offering, however, is not to address directly the standing issue. If, as in so many prior cases brought by persons challenging the constitutional eligibility of, for example, Barack Hussein Obama, Jr.; John McCain; Ted Cruz and others, the standing barrier is deemed to be impenetrable, then the substantive questions will never be answered, at least by the U.S. Supreme Court. Instead, those questions – and ersatz responses, not to be confused with “answers” – will be relegated to lower court opinions, convoluted law review articles, solicitor general opinions or the ruminations and heavily-footnoted penumbras of memoranda and reports from the Congressional Research Service (“CRS”). The CRS, of course, is, advertised to be the repository of the [“nation’s best thinking.”](#) Really?

Ah, yes, faithful P&E readers, you knew the CRS would eventually surface in this post, did you not? You were correct. Your humble servant proposes in this offering to hypothesize one topic that a true *amicus curiae* brief could address and bring to the Court’s attention having relevancy to the determination of the substantive “natural born Citizen” issue, *i.e.*, the [“Elg ellipsis.”](#) The “standing” question will be left to minds far more vast and wise than the one housed in your servant’s cranium.

As a prefatory matter, there is little dispute that the “natural born Citizen” clause now found in [Art. 2, § 1, Cl. 5](#) of the Constitution was added to the draft document as the result of a July 25, 1787 letter penned by Founder John Jay to the Chairman of the Constitutional Convention, General [George Washington](#). Jay, of course, a Founder and one of the “Publius” contributors to *The Federalist*, would later become the first Chief Justice of the Supreme Court.



While there are many issues relevant to the questions presented, the focus of the present hypothetical *amicus curiae* brief on the substantive “natural born Citizen” issue will be directed to the CRS alteration of words, via an ellipsis omission, in a Supreme Court

opinion. The ellipsis improperly allowed (and conveyed) a false conclusion as to what the Supreme Court had actually stated – and thus meant – in the opinion.

Specifically, by utilizing an ellipsis omission of a date – intentional or inadvertent – from a quote set out in the 1939 Supreme Court decision in [Perkins v. Elg](#), 307 U.S. 325 (1939), a 2009 CRS [memorandum](#) resulted in support for the argument that, even if a child was born in the United States to alien parents, that child would be eligible to the presidency as a “natural born Citizen” under Art. 2, § 1, Cl. 5 of the Constitution. This 2009 CRS memo thus cosmetically “legitimized” the constitutional eligibility of, among others, Barack Hussein Obama, Jr.

In effect, the memorandum asserted that a child born here as a “citizen” by virtue of the 14<sup>th</sup> Amendment was eligible to the presidency under Art. 2, § 1, Cl. 5 as well. The argument was based primarily on the analysis of the 14<sup>th</sup> Amendment found in the 1898 Supreme Court decision in [United States v. Wong Kim Ark](#), 169 U.S. 649 (1898).

The flaw in the argument, however, was that any extrapolation of the 14<sup>th</sup> Amendment “citizen” analysis in *Wong Kim Ark* to include a purported determination of “natural born citizen” status in Mr. Ark was “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). As the Supreme Court has noted: “Dictum settles nothing, even in the court that utters it.” See, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005).

Moreover, there is ample documented evidence that this flawed assumption was *not* what the Founders – including John Jay – intended. Instead, their understanding of the term “natural born Citizen” as used in the Constitution more likely corresponded to the definition of the term as found in § 212 of Emmerich de Vattel’s 1758 treatise, “*Le Droit des Gens*,” or “*The Law of Nations*.” And this conclusion obtains all the more so due to the fact that the 14<sup>th</sup> Amendment was not ratified until 1868, long after Art. 2, § 1, Cl. 5 was adopted as part of the Constitution in 1787.

Section 212 of the de Vattel tome provides, in relevant part, that “The natives, or natural-born citizens, are those born in the country, of parents who are citizens.” The section also notes 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.”

While some debate persists regarding the distinction, in 1758, between the French term “indigenes” and the Anglicized 1760 translation “natural born citizens,” that anomaly was resolved by the Supreme Court in the 1875 decision in [Minor v. Happersett](#), 88 U.S. 162 (1875).

There, the Court stated, 88 U.S. at 167-68: “[t]he Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country *of parents who were its citizens* became themselves, upon their birth, citizens also. These were natives, or *natural-born citizens*, as

distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. *As to this class there have been doubts, but never as to the first.*” (Emphasis added)

Returning, therefore, to the *Elg* opinion, while the father being discussed in that case – “Steinkauler the Elder” – was, in fact, a U.S. citizen at the time of his son’s birth in St. Louis, Missouri, the ellipsis omission of the language and associated punctuation “; was naturalized in 1854,” by the CRS enabled the concoction of the argument – falsely attributed to the Supreme Court based on the altered text – that the father’s son was a “natural born citizen” eligible to the presidency *despite* the purported, but falsely manufactured, “foreign” citizenship of the father.

Not only does this misleading conclusion violate the integrity of published Supreme Court opinions, it may well also constitute a breach of the federal false statements act, [18 U.S.C. § 1001](#). That statute, originally passed in 1934 as an amendment to 18 U.S.C. § 80 of the federal criminal code, was intended by Congress to penalize the knowing and willful acts of falsifying, concealing or covering up by trick, scheme or device any material fact within the jurisdiction of any federal agency, including the Congress, as discussed [here](#).

The law also criminalizes the acts of knowingly and willfully making materially false, fictitious or fraudulent statements or representations, including false writings or documents knowing that the same contain any materially false, fictitious or fraudulent statements or entries. Significantly, the statements or writings which might constitute the basis for the offense need not be made under oath, the violation of which would otherwise constitute a separate offense under federal forgery or perjury laws.

The “Steinkauler the Elder” fictitious “not-a-U.S.-citizen-when-Steinkauler-the-Younger-was-born” ruse was repeated, with slight variation but with the same ellipsis text omission, in 2011 in CRS formal Report [R42097](#).

But then, inexplicably and without prior notice, in 2016, that same CRS report – R42097 – was modified and reissued, but this time with the previously ellipsis-omitted language..., wait for it..., wait for it: magically [restored](#), making it appear that the ellipsis [never occurred](#). Even more ominously, the 2016 “corrected” version of CRS Report R42097 is today not accessible at the official Congressional Research Service report search website, which now states that “zero” results exist for that [report](#). Go ahead, try it. The “ellipsis-corrected” version of the report is now accessible only at the private website, “everycrsreport.com.” A cynic might be tempted to conclude that this was a surreptitious, but clumsy attempt to “cover one’s tracks.” The impropriety of these actions has been addressed and discussed exhaustively by your humble servant for many years, beginning in 2011 [here](#).

In short, the original 2009 memorandum’s ellipsis omission in the *Elg* case conveyed, until 2016 when the omission was “undone,” the false conclusion that a person born to an alien father – when the father was actually a previously-naturalized U.S. citizen – was nonetheless a “natural born Citizen” as intended by the Founders. Curiously, that CRS-sponsored misinformation persisted for over seven years, corresponding, largely, with the two terms in office of one Barack Hussein Obama, Jr. Coincidence? Perhaps..., and [perhaps not](#).

At bottom, the linguistic chicanery apparently committed in 2009 and 2011, then “Memory-Holed” in 2016, materially altered that which the Supreme Court stated in its original, unaltered *Elg* decision. It would be impossible to calculate or quantify the effect that the 2009 and 2011 CRS “products” had on the 535 members of Congress, a myriad of jurists and all but a few journalists. But given the nature of the issue and the fact that one Barack Hussein Obama, Jr. was the then-chief beneficiary of those products between 2009 and 2016, it is a safe bet that their impact was bigger than zero.

And now, whenever those CRS products are cited in blind support of the argument that a “native citizen” or a “citizen at birth” under the 14<sup>th</sup> Amendment suffices to bolster the conclusion that such persons are also “natural born citizens” for presidential eligibility purposes – as well as “natural born citizens” for 12<sup>th</sup> Amendment purposes – such reliance is nonsense. The two terms “citizens” and “natural born Citizens” are not the same. Nor did the Founders consider them to be equivalent or synonymous.

As proof that the Founders did not consider them to be the same, one need look no farther than the language of Art. 2, § 1, Cl. 5 itself. There, the Founders included a “citizen grandfather clause” excepting from the “natural born Citizen” restriction for the presidency a provision for “citizens” who, at the time of the adoption of the Constitution, were themselves not “natural born Citizens” as articulated in § 212 of the de Vattel tome.



We know

Indeed, without that “citizen grandfather clause,” the first seven presidents of the Republic – Washington; J. Adams; Jefferson; Madison; Monroe; J.Q. Adams and Jackson – would have been usurpers of the office, as none of them were natural born citizens because at the time of their respective births, their parents were still pre-American British, Scottish, Irish or other European citizens or subjects. The first true “natural born Citizen” president of the United States was Martin Van Buren.

Accordingly, there should be little dispute that the confusion and obfuscation engendered by the “*Elg* ellipsis” is evident. But for the reliance on the CRS “products” over the years by lower courts; by the vast majority of members of Congress; by virtually the entirety of the electorate; and by the mainstream media, the confusion over who is – and more importantly, who is *not* – a natural born Citizen for presidential and vice-presidential purposes needs to be

addressed and resolved. Absent that action, the issue will continue to bubble up every four years, and sometimes even more frequently.

Stated otherwise, as the Republic's "court of last resort," the U.S. Supreme Court is the only venue where, short of a constitutional amendment, the issue can be addressed and constitutionally adjudicated. See [\*M'Culloch v. Maryland\*](#), 17 U.S. 316 (1819).

And that, faithful P&E readers, is what a hypothetical *amicus curiae* brief on the issues might look like, except for the reference to "coincidence" and "Newman Day." Oh, and not to put too fine a point on it, last night your faithful servant channeled John Jay and George Washington. They concurred: the *Elg* ellipsis and the fallout from it need to be addressed and corrected.

Now would be a good time for those activities to happen in USSC Docket No. 20-1503.

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*Updated, 10:21 p.m. EDT.*

*Editor's Note: This post has been corrected to say "Thursday, May 13" rather than "Thursday, May 12."*