The Kamala Devi Harris Eligibility Question, Part 1

DOES THE 14TH AMENDMENT CONFER STATUS AS A "NATURAL BORN CITIZEN?"

by Joseph DeMaio, ©2020

Sen. Kamala Harris speaks on the floor of the U.S .Senate June 23, 2020 following the police-involved deaths of several black Americans (C-Span, Harris's website)

(Aug. 18, 2020) — ***Backdrop***

Like Mt. St. Helens 40 years ago, the constitutional "natural born citizen" eligibility issue has again erupted. Following the announcement that Slow Joe Biden had selected a "person of color" who was in addition a woman – Kamala Devi Harris – as his running mate, renewed questions immediately began surfacing as to whether she was constitutionally eligible to serve as either Vice-President or President.

Oh, the horror… the *humanity*! The pyroclastic flow of outraged invective from leftist editors, media hacks and talking heads at CNN sped furiously toward President Trump. It focused, of course, on his temerity in failing to immediately quash any questioning *whatsoever* of Harris's eligibility as being premised on (you guessed it…): racism, misogyny and the "discredited" theories of "birtherism." When reasoned debate and rational discussion do not suffice, rest assured, the left will always fall back on false pejoratives. ***Always.***

As a preliminary matter, faithful P&E readers, let us agree that neither the melanin content of one's skin nor the XY/YY structure of one's cellular-embedded chromosomes should operate as an inoculation against analysis or examination of one's constitutional eligibility. A black, brown, polka-dot, plaid or albino person – XY male or YY female in gender – aspiring to the presidency or the vice-presidency has no more right to claim immunity from such scrutiny than would a "white" person – XY or YY in gender – with similar goals. To contend otherwise is irrational…, as well as stupid.

And, by the way, the current woke acronym du jour – "POC," meaning "person of color" as referencing anyone other than an individual of Anglo or Caucasian background – is not only dumb, but scientifically wrong as well. White is a "color," albeit an achromatic color, just like "red," "blue," "green" and "orange"… as in "orange man." Thus, the use by leftist woke speech warriors of "POC" to describe persons *other* than those possessed of Anglo or Caucasian characteristics is not only scientifically erroneous, it is *because* of its scientific inaccuracy that its utterance or printing is, at bottom, itself racist in nature.

What possible justification exists for excluding, "between the lines," persons of the "white" color from the class of individuals called "persons of color?" Is the "Orange Man" to be included or excluded? The civil rights violations are manifest. Moreover, the POC acronym constitutes "misinformation" which should be "culture-canceled" and censored on the Internet and social media platforms. Where are the social justice warriors? Where is the ACLU?

But I digress.

The Harris eligibility issue was recently addressed by many at numerous places, including by your faithful servant here. The general topic of presidential eligibility as relating to Barack Hussein Obama, Jr., of course, has been addressed here at the P&E for many years by various persons, such as here, here and here.

Among the "other places" where Ms. Harris's constitutional eligibility has recently been addressed was Newsweek Magazine (print as well as online) in an op-ed piece authored by one John Eastman, a law professor at Chapman University Law School.

RECONSTRUCTION.

RATIFICATION OF THE FOURTEENTH AMENDMENT.

WASHINGTON, July 19.—The President publishes the following, officially announcing the ratification by South Carolina and Louisiana of the Fourteenth amendment to the Constitution of the United States:

By the President of the United States of America.

A PROCLAMATION.

Whereas, By an act of Congress entitled "An act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to representation in Congress," passed the 25th day of June, 1868, it is declared that it is made the duty of the President, within ten days after receiving official information of the ratification by the Legislatures of either of said States of a proposed amendment to the Constitution, known as article 14, to issue a proclamation announcing that fact; and,

Whereas, On the 18th day of July, 1868, a letter was received by the President, which letter being addressed to the President, bears date of July 13, 1868, and was transmitted by and under the name of R. K. Scott, who therein writes himself Governor of South Carolina, in which letter was inclosed and received at the same time by the President a paper purporting to be a resolution of the Senate and House of Representatives of the General Assembly of the State of South Carolina, ratifying the said proposed amendment, and also purporting to have passed the two said Houses respectively, on the 9th and 9th of July, 1868, and to have been approved by the said R. K. Scott, as Governor of said State, on the 18th of July, 1868, which circumstances are attested by the signatures of D. T. Corbin, as President *pro tempore* of the Senate, and of F. J. Moses, jr., as Speaker of the House of Representatives of said State, and of the said R. K. Scott, as Governor;

Now, therefore, be it known, That I, Andrew Johnson, President of the United States of America, in compliance with the execution of the Act of Congress aforesaid, do issue this, my proclamation, announcing the fact of the ratification of the said amendment by the Legislature of the State of South Carolina in the manner hereinbefore set forth.

In testimony whereof I have signed these presents with my hand, and have caused the seal of the United States to be hereto affixed.

A column published in the July 20, 1868 New York Tribune announcing the ratification of the 14th Amendment (courtesy Library of Congress)

It is that article which triggered the leftist howls. Professor Eastman questioned whether Ms. Harris was a natural born citizen in light of the fact that, when she was born, neither of her parents were U.S. citizens. The focus of his article was on whether Ms. Harris could

properly claim "birthright citizenship" under the 14th Amendment as the equivalent of status as a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the Constitution.

A contrary view, positing that Ms. Harris is, in fact, eligible as a "natural born citizen," was also published in Newsweek in response to a flood of criticism claiming that the Eastman article was legally wrong, and suggesting that it was racist to boot. That article, penned by UCLA law professor Eugene Volokh, posits that Ms. Harris enjoys "birthright citizenship" under the 14th Amendment as interpreted by the U.S. Supreme Court decision in *United States v. Wong Kim Ark* ("*WKA*") and is therefore eligible to the office of the Vice-President as a natural born citizen.

So who is right? Answer: nobody knows for sure, because the Supreme Court has not yet directly ruled on the question. However, there are some indicators as to which argument is the better reasoned and is more consistent with the intent of the Founders. Interested readers should continue; disinterested readers should not.

The Wong Kim Ark Decision

Still here? Good. Let us begin.

First, the *WKA* majority opinion (yes, Virginia, it was a 6-2 decision with a dissenting opinion which is, in your humble servant's view and respectfully, better reasoned than the majority opinion…) has become the lodestar decision for those who argue that all presidential eligibility questions have been "settled" and that if a person in merely born on United States soil, that person is constitutionally eligible to the presidency regardless of the citizenship status of the person's parents. Simple…, yes?

Ummmm…, no.

It is (or should be) no secret that your faithful servant believes that serious and legitimate questions remain as to whether Ms. Harris is, in fact and in law, a natural born citizen under Art. 2, § 1, Cl. 5 of the Constitution, the so-called "Eligibility Clause."

On the rebuttable presumption that we are still allowed to discuss the issue, please note that your faithful servant does not subscribe to the argument that the *WKA* opinion is the "be all, end all" decision completely "settling" the question, as posited by virtually all of those supporting the notion that Ms. Harris is constitutionally eligible.

Second, the *WKA* decision does not, as argued by Professor Volokh in his article (or others of a similar mind, including Cleveland-Marshall College of Law Professor Reginald Oh, here, resolve the issue. Specifically, Professor Volokh claims that in the *WKA* opinion, the Supreme Court "interpreted the 14th Amendment as reaffirming [*sic*] that people born in the U.S. are indeed natural-born citizens, regardless of their parents' citizenship."

Ummmm…, wrong.

United States v. Wong Kim Ark

Supreme Court of the United States

Argued March 5, 8, 1897
Decided March 28, 1898

Full case name	*United States v. Wong Kim Ark*
Citations	169 U.S. 649 (*more*) 18 S.Ct. 456; 42 L.Ed. 890
Prior history	Appeal from the District Court of the United States for the Northern District of California; 71 F. 382

Holding

Children born in the United States of foreigners permanently domiciled and resident in the U.S. at the time of birth automatically acquire U.S. citizenship via the Citizenship Clause of the Fourteenth Amendment.

Summary of United States v. Wong Kim Ark (Wikipedia)

The decision in *WKA* says no such thing, and the dissent therein underscores that simple reality. That which the majority opinion *does* say is that, under the *only* constitutional provision at issue in the case – the 14th Amendment, and ***not*** the Constitution's Eligibility Clause – "the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States."

A majority of the Court – again, over the dissenting opinions of Chief Justice Fuller and Associate Justice Harlan – concluded that, under the 14th Amendment, Wong Kim Ark was a U.S. "citizen" upon his birth in San Francisco. However, nowhere in the opinion does the majority state that Wong Kim Ark was, in addition, a "natural born citizen." Recall that all natural born citizens are also 14th Amendment native-born citizens or "citizens at birth," but not all native-born citizens are natural born citizens. Think Euler diagrams.

Third, as for the argument posited by many *WKA* enthusiasts that the various discussions in the majority opinion of "natural born citizens" in *other* than a presidential eligibility context are "precedential" and, purportedly, control the result, those discussions 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.

Dictum consists of the passing comments or observations of a judge in a case, but on facts or points of law unrelated to the issue presented in the case and having no effect on the holding

of the case or judgment. While "dictum" appearing in a case may be interesting, it is neither part of the "holding" of the case nor citable as binding or controlling "precedent."

Accordingly, those who would contend that *WKA* "settles" the eligibility question are, respectfully, wrong. There is no such thing as "precedential dictum" because, as noted by the Supreme Court, "[d]ictum settles nothing, *even in the court that utters it.*" (Emphasis added). *See*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005).

At least Professor Oh in his Newsweek article acknowledges that the *WKA* majority discussions of "natural born citizens" in non-Eligibility Clause contexts constitute dicta in the case. He nonetheless argues that *WKA* "effectively ratified the plain meaning of the Citizenship Clause, and the case remains to this day the most definitive explication of that clause's meaning."

The "Citizenship Clause" to which Professor Oh is referring is found in the first section of the 14th Amendment defining "citizens" as being persons born here who are in addition "subject to the jurisdiction" of the United States. Not all persons born here are "subject to the jurisdiction" of the United States, as, for example, children born here to diplomatic personnel of foreign nations.

With due respect, the "Citizenship Clause" of the 14th Amendment – the sole constitutional provision presented and adjudicated in *WKA* – addresses only whether a person born here of alien parents is to be considered a "citizen." The Citizenship Clause of the 14th Amendment has nothing… repeat, ***nothing*** to do with the proper analysis of the term "natural born Citizen" under the Eligibility Clause of the Constitution, Art. 2, § 1, Cl. 5. Period. Full stop. Boom.

Admittedly, reasonable minds can and do differ. That is why Professors Eastman, Volokh and Oh – to name but a few – continue swapping ideas and arguments on the Newsweek (and other) websites. But none of those esteemed law professors are Justices of the U.S. Supreme Court. If they were, their arguments might have more force for their respective positions.

But until the actual U.S. Supreme Court – with actual Justices participating – issues a decision in a ripe "case or controversy" addressing the eligibility question in the context of a sitting president or actual candidates for the presidency and vice-presidency, the issue will remain decidedly *not* "settled." *WKA* is not that case.

Editor's Note: *Part 2 of the above essay will follow in the very near future.*