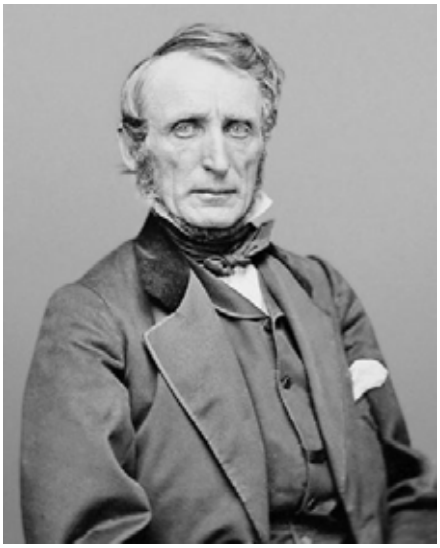
The Kamala Devi Harris Eligibility Question, Part 2

"…OF PARENTS NOT OWING ALLEGIANCE TO ANY FOREIGN SOVEREIGNTY…"

by Joseph DeMaio, ©2020



Rep. John Bingham (public domain)

(Aug. 19, 2020) — [The following is continued from Part 1 of this series. "WKA" refers to the case of *United States v. Wong Kim Ark*.]

Congressman John Bingham and the 14th Amendment

One additional aspect of the analysis of the 14th Amendment as relevant to the *WKA* decision involves its history. Clearly, the 14th Amendment was primarily proposed and ratified as a result of the outcome of the Civil War. In addition, it was the desire of the Congress – at least the Republican members of Congress, most Democrats then being opposed to it – to ensure that persons previously enslaved under the laws of various states as well as all persons thereafter born here be accorded the rights of citizenship under the Constitution and the full and plenary protections of the Bill of Rights.

But in addition, the legislative history of the amendment and various congressional debates leading up to its passage and ratification also reveal some relevant additional historical information concerning what the prime sponsor of the measure – Representative John Bingham (R. OH) – believed to be the distinction between a "citizen" as addressed in what would eventually become the proposed amendment and a "natural born citizen" addressed elsewhere. This issue was addressed years ago here at The P&E.

Specifically, Bingham, a lawyer by trade and a committed abolitionist, was categorically opposed to slavery for many years prior to his drafting and introduction of the bill that eventually became the 14th Amendment. His remarks in connection with the topic of slavery in the nation reveal that he recognized and acknowledged the difference between a "citizen" – that is, a person born on the soil of the United States and "subject to the jurisdiction thereof" – and a "natural born citizen," which subset of "citizens" required in addition to birth on U.S. soil that the person's parents be, at the time of the birth, already U.S. citizens, whether naturalized or natural born themselves.

Recall again that while all natural born citizens are also native-born citizens, not all native-born citizens are natural born citizens. This is the teaching of § 212 of Emmerich de Vattel's 1758 tome, *The Law of Nations*. The importance of that work and the reliance placed upon it by the Founders in drafting the Constitution is acknowledged and discussed by the Supreme Court in *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).

Significantly, in the *U.S. Steel* case, the Supreme Court states with regard to de Vattel: "The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel" and cites as its supporting authority for that conclusion "1 J. Kent, Commentaries on American Law 18 (1826)." Kent's *Commentaries on American Law* is frequently cited by the "birthright-citizenship-is-good-enough-for-presidential-eligibility-purposes" crowd when discussing the *WKA* majority opinion and rejecting the importance of de Vattel in analyzing the issue. One is reminded of the adage that "what's good for the goose is good for the gander." Consistency has never been the left's strong suit.

Section 212 of the de Vattel treatise articulates the principle that, in order for a person to be a "natural born citizen," as opposed to being a "native born citizen," the person must be actually born in the country of citizenship origin to parents – a mother *and* a father – who are already citizens of that country.

Section 212 also notes: "[T]he country of the *fathers* is therefore that of the children… [and]… 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)

Against this backdrop, with which John Bingham was presumably well-aware, in the years preceding the passage and enactment of the 14th Amendment, he argued eloquently for the abolition of slavery. He correctly argued that it was an outrage against the Constitution, but that no enforcement mechanism was available under the existing Constitution. An amendment would be needed.


1862 THE CONGRESSIONAL GLOBE. 1639

Source: *Congressional Globe*

Accordingly, on April 11, 1862, when the 14th Amendment was but a future glimmer in his eye, Bingham rose on the House floor in support of such a proposed amendment. *See* Congressional Globe, House of Representatives, 37th Congress, 2nd Session at p. 1639.

During his remarks to the assembled Representatives addressing the concept of citizens and citizenship, he specifically identified the persons to whom the proposed amendment would apply thusly: "There is no such word as ["]white["] in your Constitution. Citizenship, therefore, does not depend upon complexion any more than it depends upon the rights of election or of office. All from other lands, who, by the terms of your laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; *all* ***other*** *persons born within the Republic,* ***of parents owing allegiance to no other sovereignty, are natural-born citizens.***" (Emphasis added)

Then, some four years later, on March 9, 1866, less than one year following the end of the Civil War, Bingham rose again on the floor of the House. This time he addressed his assembled colleagues on a Senate bill (S. 61) entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their vindication" forwarded to the House for action.

Congressman Bingham again articulated his recognition of the distinction between "citizens" and "natural born citizens" thusly: "I find no fault with the introductory clause, which is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States ***of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen***…." (Emphasis added) *See* Congressional Globe, House of Representatives, 39th Congress, 1st Session at p. 1291.

The significance of Mr. Bingham's remarks in 1866 lies in his reference to the term "natural-born citizen" as being found "*in the language of [the] Constitution itself*." (Emphasis added) Yes, Virginia, you are correct: the ***only*** place in the Constitution where the term "natural-born citizen" is found is Art. 2, § 1, Cl. 5, the presidential Eligibility Clause. The term appears nowhere else in that founding document. It is therefore abundantly clear that Mr. Bingham was not referring to a term he had accidentally come across in the then-recently-founded (1851) New York Times.

Plainly, Congressman Bingham's understanding of the term "natural born citizen" when he was identifying persons included within that subset of the "citizens" to be covered by his proposed constitutional amendment was grounded in the term appearing in the Constitution's Eligibility Clause.

Stated otherwise, Bingham recognized that the "language of the Constitution itself" meant that, insofar as eligibility to the presidency was concerned, a "natural born citizen" was a person born here to parents who were already citizens of the United States since, by definition, U.S. citizen parents are those who do not owe "allegiance to any foreign sovereignty."

The import and significance of Bingham's words are clear: he understood and acknowledged that insofar as a proposed amendment to the Constitution guaranteeing the enforceable rights of citizenship to *all* persons born or naturalized in the United States was concerned, the subset of the society who were born here to "parents owing allegiance to no other sovereignty" were "natural born citizens." While others were "native-born" citizens, they were not natural born citizens, yet ***all*** would be covered by the terms of the proposed amendment.


LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
TOME I.
A LONDRES.
M. DCC. LVIII.

Emmerich de Vattel's "The Law of Nations" was published in 1758

This principle, of course, is precisely the one set out in § 212 of de Vattel's treatise relied upon by the Founders. Persons born to parents who ***do*** owe allegiance to another sovereignty – such as the Chinese-national parents, many years later, of Wong Kim Ark – are 14th Amendment native-born citizens of the United States…, but they are not natural born citizens for Art. 2, § 1, Cl. 5 purposes. Lamentably for the *WKA* presidential eligibility "be all/end all" enthusiasts, it is that simple.

Any argument, therefore, that the *WKA* opinion supports the notion that the 14th Amendment was intended to bestow "natural born citizen" status upon persons whose parents in fact and in law owed an allegiance to a foreign nation is plainly at odds with the understanding of the term by the author and prime sponsor of the 14th Amendment, John Bingham.

Moreover, while the views of individual congressmen as to what a particular law – including constitutional amendments – means carries less weight in evaluating the history or intent of the law, the rule is different when the congressman expressing those views is the author and sponsor of the law. *See, e.g.*, *Federal Energy Administration v. Algonquin SNG, Inc.* (statements by sponsors as to the intent of a proposed law deserve to be "accorded substantial weight in interpreting the law.")

Conclusion… for the time being

So, faithful P&E readers, your humble servant believes that the vice-presidential eligibility *bona fides* of Ms. Kamala Devi Harris remain very much in doubt. Whether or not those doubts can or will be resolved before the November 3, 2020 general election remains to be seen. The smart money wagers that the issue will *not* be resolved by then, particularly when both President Trump and Vice-President Pence have indicated that they do not intend to pursue the matter. Too bad.

That decision, of course, is theirs to make, right or wrong. But even if they decline to initiate further inquiry, the legal issue remains: is Kamala Devi Harris eligible to the vice-presidency? Candidly, if the DNC were smart (a *highly* debatable proposition, given who has been chosen to head the Democrat ticket in November), *they* would bring a declaratory judgment action now as suggested here.

After all, with the stakes as high as they are; with an army of learned professors, media "experts" and politicians yelping that the issue is "settled;" and with the purportedly "controlling" decision in *WKA* out there – not to mention a Supreme Court headed up by Chief Justice John Roberts – what have they got to lose?

Answer: maybe the election. Better to keep saying "move along…, nothing to see here…" and "pay no attention to that man behind the curtain." They are winning the public perception war, so why rock the boat?

Is this a great country or ***what?!*** Again, vote *very* carefully in November.