

# The Laity Complaint and Wong Kim Ark

"RESPECTFULLY, FLAT WRONG"

by [Joseph DeMaio](#), ©2020



(Nov. 9, 2020) — **Introduction**

The Associated Press and a large swath of the Trump Derangement Syndrome media have declared the Biden-Harris ticket the winners of the 2020 general election. As noted [here](#), media hacks are not the final arbiters of who wins elections. If they were, there would have been no need for the spastic rigmarole of the election in the first place.

The prudent next step is to wait until the coming [legal proceedings](#) and Supreme Court [orders](#) run their course. Stated otherwise, this may be another case of premature [celebration](#).

Accordingly, as the 2020 election train-wreck continues careening down the track, the issue of the constitutional eligibility of Kamala Devi Harris ("KDH") to serve as Vice-President returns to a front burner, taking on somber, added [significance](#).

If the train-wreck lamentably culminates in the certified, post-runoff, post-litigation election of the Biden-Harris ticket, the nation will be poised to have inflicted upon it – for perhaps the third time since 1881, when Chester A. Arthur was inaugurated "president" – a person who is likely ineligible to serve as either vice-president or president. Barack Hussein Obama, Jr., of course, was the Second Usurper in Chief ("SUC").

Moreover, as noted [here](#), the Founders are furious..., and you should be, too. And for that reason, this post may be longer than others in order to explain the details of the issue and the

impending debacle. If not already dissuaded, P&E readers are therefore encouraged to have their favorite caffeinated beverage nearby if they intend to read any farther.

## The Laity Lawsuit

Still here? Excellent. Let us proceed.

New York citizen-patriot Robert Laity has filed a *pro se* [complaint](#) in the U.S. District Court for the District of Columbia seeking to prevent KDH from serving as Vice-President in the event the Biden-Harris ticket legitimately wins the election. It is claimed that she is ineligible under the 12<sup>th</sup> Amendment because she is not a “natural born Citizen.”

Useful backdrop information is found [here](#), including in the “comments” section the fact that eligibility expert attorney [Mario Apuzzo](#) is expected to file an *amicus curiae* brief in support of Mr. Laity. The case is presently pending before Judge Emmett Sullivan, the same judge presiding over the General Michael Flynn [case](#).

To virtually no one’s surprise, the lawyers for KDH have moved to [dismiss](#) the complaint. Unsurprisingly as well, it makes the “usual suspects” arguments that (a) Mr. Laity lacks the requisite “standing” to bring and maintain the suit, and (b) even if it is assumed that he has the necessary standing, the Supreme Court’s decision in [United States v. Wong Kim Ark](#), 169 U.S. 649 (1898) (“WKA”) controls and requires dismissal.

Mr. Laity has [responded](#) to the motion to dismiss and the KDH lawyer, Mr. Ben Razi at Covington & Burling, has [replied](#), thereby placing the matter “at issue.” Unless one or the other of the litigants has requested oral argument, the motion could be ruled on at any time.

While both sides articulate their respective positions, this post will focus on one discrete aspect of the KDH Motion to Dismiss, *i.e.*, its slavish and misplaced reliance on the purportedly “controlling” decision in the WKA case. The motion to dismiss posits that, because the opinion in WKA adjudicates the meaning of the term “natural born Citizen” for purposes of presidential eligibility under Art. 2, § 1, Cl. 5 of the Constitution, the complaint fails to “state a claim” for the relief sought and must therefore be dismissed.

Not so fast..., there are more than a few anomalies in the KDH memo – and the exalted decision in WKA – warranting closer examination.

## The WKA Anomaly

At the outset, a confession: your faithful servant has recently discovered an anomaly in the Supreme Court’s WKA opinion which he should have identified long ago. I mean, the case was only decided 122 years ago. Mea culpa. The anomaly – your servant’s polite term for “error” – could have significance in future litigation which might involve analysis of the intent of the Founders when drafting the Constitution.

Quite apart from the later discussion of the irrelevancy of the WKA decision to the proper analysis of the “natural born Citizen” issue under the Constitution’s “Eligibility Clause,” Art.

2, § 1, Cl. 5, the existence of a fundamental error in the *WKA* analysis of the Founders' intent regarding the issue is now addressed.

To begin with, one of the primary arguments advanced by those who contend that *WKA* controls on the issue lies in reliance upon the initial enactments of the Congress with respect to the naturalization of persons to become citizens of their new republic. Since many members of the First Congress were also participants and signers of the Constitution, who better to look to for intent regarding the issue?

As noted [here](#), although the first congressional act on immigration and naturalization in 1790 – 1 Stat. 103 – stated that children born “beyond sea” to U.S. citizen parents were “considered” to be “natural born citizens,” only five years later, in 1795, that statute was repealed in its entirety.

In the new statute – 1 Stat. 414 – repealing the prior one – 1 Stat. 103 – the Congress, apparently recognizing that it could not by a statute like 1 Stat. 103 alter or amend the intent of the Eligibility Clause regarding the understood definition (*cf. Minor v. Happersett*, 88 U.S. at 167-168) of “natural born Citizen” therein, deleted the words “natural born” before the word “citizen.” That Congress actually made the deletion – regardless of whether it was a conscious, intentional deletion, as opposed to a “stylistic” or “accidental” omission – is beyond dispute: the words “natural-born” in 1 Stat. 103 do not appear in 1 Stat. 414.

And yet, 103 years after 1 Stat. 414 became law, deleting the “natural-born” modifier that had previously existed, this is what Associate Supreme Court Justice Horace Gray said in the majority opinion he authored (yes, Virginia..., there is a cogent dissent in *WKA*), 169 U.S. at 672-673: “In the act of 1790, the provision as to foreign-born children of American citizens was as follows: ‘The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as *natural-born* citizens: provided, that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.’ 1 Stat. 103 [at 104]. In 1795, this was re-enacted, ***in the same words***, except in substituting, for the words ‘beyond sea, or out of the limits of the United States,’ the words, ‘out of the limits and jurisdiction of the United States.’ *Id.* 415.” (Emphasis added).

Seriously? Really? Respectfully, wrong, [Mr. Justice Gray](#) (appointed by the first usurper in chief, Chester A. Arthur ..., flat wrong.

Justice Gray took the time to identify in the 1795 statute *one* alteration of the language of 1 Stat. 103..., but not the other one deleting “natural born” before the word “citizen.” The 1795 statute is demonstrably ***not*** a re-enactment of the 1790 statute “in the same words” as claimed by Justice Gray. On the contrary, the subsequent statute was enacted with *different* words and with corresponding *different*, substantive legal import.

Indeed, a casual reading of Justice Gray's language in the *WKA* opinion, without further examination of the history of both 1 Stat. 103 and 1 Stat. 414, could easily lead readers – including former U.S. [Solicitors General](#) – to conclude, wrongly, that 1 Stat. 414 preserved the “natural-born” adjective before the word “citizen.”

In fact, contrary to Justice Gray’s assertion, the Congress deleted “natural born” in 1795 and has never since that time re-enacted the modifier to describe a child born to U.S. citizen parents beyond the boundaries of the United States as anything other than a “citizen.” Period.

Accordingly, Justice Gray’s assertion, whether characterized as dictum or otherwise, is factually and demonstrably in error. Moreover, that error implicates directly any reliance on *WKA* by virtually any member of the “‘citizen’-and-‘natural born citizen’-are-synonymous” crowd, including Messrs. [Clement and Katyal](#) and non-USSC lower courts that treat *WKA* as the “be-all-end-all” of the analysis, including *Ankeny v. Governor of the State of Indiana*, 916 N.E.2d 678 (App. 2009). In fact, although the Clement/Katyal article acknowledges (by a footnote) that the 1790 statute was repealed by the 1795 statute, it gives no details as to the underlying reasons for the repeal nor to the differently-worded 1795 statute.

This single anomaly (aka “error”) in *WKA* renders all of the remaining discussion therein of who is, and who is not, a natural born citizen – even if the dictum discussion be deemed, contrary to reality, part of the “holding” of the decision – similarly in error and inconsistent with the Founders’ intent in drafting the Eligibility Clause.

Giving Justice Gray the benefit of the doubt, let us just presume that his “error” was due only to carelessness or a failure to adequately research the history of 1 Stat. 103 and 1 Stat. 414 by his law clerks, because a contrary conclusion – that the “error” was intentional – would be problematic..., no?

Stated otherwise, *WKA* ain’t even close to being the “be-all-end-all” Supreme Court decision on the issue. Moreover, the existence of a century-plus error in the opinion does not contribute positively to its value in the analysis of Art. 2, § 1, Cl. 5 or 12<sup>th</sup> Amendment issues.

### **The Argument that *WKA* Controls is Absurd**

Even if one disregards the fundamental error of the *WKA* “anomaly” discussed above, one would think that by now, those who argue that the decision is the “be-all-end-all” of challenges to presidential and vice-presidential eligibility issues would have read the decision itself as opposed to the various dictum references to other cases having *nothing* to do with Art. 2, § 1, Cl. 5 of the Constitution, the presidential “Eligibility Clause.” Alas, such is not the case, as evidenced by the KDH legal memo opposing the Laity complaint.

As repeatedly noted over the years here at the P&E – for example [here](#); [here](#); and [here](#) – the totality of the discussions in *WKA* regarding the definition of a “natural born citizen” consists of “... 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.

And as more recently noted [here](#), because the *sole* issue presented and adjudicated in *WKA* was whether Wong Kim Ark was a “citizen” of the United States under the 14<sup>th</sup> Amendment, the totality – as in “all” – of the rest of the discussion in the case regarding “natural born citizens” was, and to this day remains as noted by Professor Gordon: “dicta, pure and simple.”

Stated otherwise, there is no such thing as “controlling, precedential dictum” and the KDH legal memo submitted in support of the motion to dismiss the Laity complaint suggesting otherwise is, respectfully, flat wrong. On the other hand, because the case is still pending before District Court Judge Emmett Sullivan – as already noted, the jurist presiding over the General Michael Flynn catastrophe – there is a good chance that the *WKA* decision will be accepted and applied by Judge Sullivan, as they say, “hook, line and sinker.” Not good.

Second, the KDH motion to dismiss and supporting memorandum of law seeks to shore up its arguments in a curious and misleading footnote in the memo, *i.e.*, footnote 3, following the memo’s textual discussion of the *WKA* decision. That footnote consists of only three sentences, but they demonstrate both a lack of understanding of the “holding” in *WKA* as well as willingness to “fudge” certain facts in pursuit of a dismissal of the complaint. Let us address them one at a time.

The first sentence reads: “The Supreme Court has long treated Article II’s phrase ‘natural born Citizen’ and the Fourteenth Amendment’s phrase ‘persons born... in the United States... are citizens’ as equivalent and [has] used them interchangeably.” Wrong. In fact, while several *non*-U.S. Supreme Court cases – chiefly lower state court decisions and even administrative law judge opinions – have carelessly treated the terms as synonyms, they are neither interchangeable nor are they synonyms. Nor has the Supreme Court treated them as interchangeable or synonymous... yet.

A “citizen” under the 14<sup>th</sup> Amendment is decidedly *not* the same as a “natural born Citizen” under Art. 2, § 1, Cl. 5 of the Constitution. While all natural-born citizens are also native-born citizens, not all native-born citizens are natural-born citizens. Think [Euler diagrams](#). More colloquially, and as noted in one of the comments [here](#), “a red Corvette convertible is at the same time a Chevrolet, [but] a Chevrolet is not at the same [time] a red Corvette convertible.”

Moreover, the first sentence of the footnote utilizes ellipsis omissions of the totality of the 14<sup>th</sup> Amendment’s actual language, yielding a misleading impression of what the 14<sup>th</sup> Amendment actually provides. This, of course, is reminiscent of the shenanigans of the Congressional Research Service when it addressed the [eligibility issue](#) as to the SUC, Barack Hussein Obama.

But I digress. The ellipsis-deleted “subject to the jurisdiction” phraseology in the KDH memo footnote, while relevant to an analysis of the operation of the 14<sup>th</sup> Amendment, has nothing to do with who may properly be defined to be a “natural born Citizen” for

presidential eligibility purposes. Nothing as in zip, zed, zero, nada. The fundamental error in the sentence is the bald (and erroneous) assertion that the U.S. Supreme Court has treated the two terms as “equivalent and [has] used them interchangeably.” Not true: lower courts may have made and embraced that mistake, but thus far, the U.S. Supreme Court has not.

The second sentence of the footnote, offering up the decision in *WKA* as an “example” of that false proposition, is manifestly disingenuous. After asserting that the Court canvassed many of “its precedents” and other courts’ decisions that “understood ‘natural born citizen’ to mean a person holding citizenship because of his or her birth in the country at issue...,” the KDH legal memo cites in purported support of that claim..., wait for it..., wait for it: “169 U.S. at 662.”

That page in the *WKA* decision, in turn, offers as authority for its purported “holding” its prior decision in *Scott v. Sandford*, 19 How. 393 (1857). This, of course, is the universally reviled “Dred Scott” decision holding that slaves could constitutionally be denied the right to vote because they were not “citizens” but instead were “property.” The case, while today still “on the books” and not formally “overruled” by the Court, was superseded and thus “abrogated” (*i.e.*, rendered of no further legal effect) in 1868 by the 14<sup>th</sup> Amendment.

Thus, one could argue that, when trying to persuade an African-American judge (*i.e.*, Emmett Sullivan) that the Laity complaint should be dismissed, it is not the best tactic to include in your argument that the decision in the most reviled case in the history of American jurisprudence, and one abrogated 152 years ago by a constitutional amendment, supports your position. Dumb.

The third sentence in the footnote references *Minor v. Happersett*, 88 U.S. 162 (1874), but does so in a misleading way. *Minor*, of course, is the Supreme Court decision which states that the Founders understood that, although there were doubts as to whether persons born here to other than citizen parents were properly deemed to be natural born citizens, as to persons born here to citizen parents, there had *never* been any doubts that they were true “natural born citizens.” The footnote description of the decision, of course, omits that fact and focuses Judge Sullivan’s attention only on the undisputed circumstance that persons born here are “citizens.”

Remember the “red Corvette” analogy: while all natural born citizens are also native born citizens, not all native born citizens are natural born citizens. The smart money wagers that the distinction will be lost on Judge Sullivan. Hope springs eternal, but in this case, only time will tell.

To summarize, the opening legal memo in support of the KDH motion to dismiss is both unpersuasive and, from KDH’s perspective, counterproductive.

### **The KDH Reply Memorandum**

The KDH “Reply Memorandum in Support of Her Motion to Dismiss” is similarly misleading. While the first portion of the memo addresses the “standing” question – the more problematic issue for Mr. Laity, in your humble servant’s view – the second section

regurgitates the arguments made in the original memo on the meaning of “natural born citizen,” but in addition seeks to minimize the “never any doubts” statement in the *Minor* opinion.

The reply memo first characterizes the Court’s statement as “dictum,” commenting that “it was unsettled in 1874 whether the U.S.-born children of foreign parents are natural born citizens.” See reply memo at 2. Even assuming that the statement by the Court in *Minor* is dictum, that does not detract from its empirically true nature, the actual separate “[holding](#)” in the case aside.

But then the reply memo states: “The [Supreme] Court settled that question [*i.e.*, the “unsettled in 1874” question] two decades later in [*WKA*], and reaffirmed its *holding* [*sic*] in the 1980’s...,” (emphasis added), citing two later immigration and deportation cases. This is patently disingenuous: “dictum” is not and cannot be “holding.”

The statements in *WKA* regarding the “natural born citizen” issue are..., let us say it again... slowly... and deliberately: “dicta..., pure..., and... simple.” Soooo..., the KDH reply memo’s characterization of the statement in *Minor* as “real” dictum, but its argument that the dictum in *WKA* is actually “holding” is OK? As Ralph Waldo Emerson [observed](#): “Foolish consistency is the hobgoblin of little minds.” Stated otherwise, the KDH Reply memo should not be taken seriously by those with larger minds.

## **Conclusion**

This post is already too long. The KDH Motion to Dismiss the Laity complaint is unpersuasive, poorly-reasoned and based, problematically, on a Supreme Court decision containing a manifestly incorrect factual anomaly. It should thus be denied. The decision in *WKA* should be disregarded as having any probative value in determining questions of constitutional eligibility for either the presidency or the vice-presidency.

And don’t forget what happened in [1948](#).