

The Natural Born Citizen Conundrum

by [Joseph DeMaio](#), ©2024



What did the Framers mean by the term “natural born Citizen?” (Architect of the U.S. Capitol, [National Archives](#))

(Aug. 7, 2024) — **INTRODUCTION**

As long-time *P&E* readers know, your humble servant has for many years railed on about the “natural born Citizen” (“nbC”) issue and how it has been handled (and mishandled) by commentators, scholars and governmental agencies such as the Congressional Research Service (“CRS”). But now, in mid-2024, with the issue again presenting itself in the form of the candidacy for president of one Kamala Devi Harris, and opposed to a tedious repeat of past posts, a brief “one-stop-shopper’s” refresher course, gathering and summarizing in one post the highlights of the debate, may be helpful for those upcoming weekend cocktail party gatherings and barbecue cook-outs where competing “discussions” (aka, “arguments”) on the topic may break out.

Your servant has on several occasions directly addressed the nbC issue as to Harris, [here](#), [here](#) and [here](#). The details of those posts will not be re-hashed here, but their conclusions remain: Kamala Devi Harris is likely constitutionally ineligible to seek the presidency, as she is very likely not a natural born Citizen as contemplated by the Founders and Framers of the Constitution.

Instead, your servant now offers the following highlights, summarizing how we got to this precarious juncture in the history of the Republic in the first place and in addition, what might be done to correct the situation, provided that there are enough patriots to put their collective shoulders to the wheel. Candidly, that goal presently seems remote, yet the only way to ensure failure is to forego the attempt. So, here goes.

ANALYSIS

One of the peskier questions regarding the presidency (and under the 12th Amendment, the vice-presidency as well) relates to who is – and who is not – eligible to the office(s) as a “natural born Citizen.” Article 2, § 1, Cl. 5 of the Constitution articulates the restriction that only a “[natural born Citizen](#)” – the Framers specifically capitalizing the “C” in “Citizen” as it appears in the Constitution – may serve as President of the United States, subject only to a long-expired “citizen-grandfather” clause exception. For the sake of brevity, the abbreviation “nbC” – prefaced by an “a” where appropriate instead of an “an” to reflect that the “n” stands for “natural” when verbalized – may be hereafter occasionally used.

The vast majority of scholars, academics, lawyers and even jurists accept and subscribe to the contemporary narrative that the term means any person who becomes a “citizen at birth” or a “citizen by birth,” with no need for subsequent naturalization proceedings – which would in any event disqualify the person under Supreme Court precedent (*see* [Angelika L. SCHNEIDER, Appellant, v. Dean RUSK, individually and as Secretary of State](#) – regardless of both parents’ U.S. citizenship and the person’s place of birth. That view has recently (2015) been [advanced](#) by two well-credentialed attorneys, Paul Clement and Neal Katyal, respectively, U.S. Solicitor General under President G.W. Bush and Principal Deputy Solicitor General under President Barack Obama. Due to their recognized intellectual gravitas, their view of who constitutes a nbC is adopted by most who have examined the issue.

Respectfully – as it can be risky to challenge the opinions of former U.S. Solicitors General – there is a contrary argument to be made. Specifically, it is here posited that an equally plausible nbC definition more closely aligning with the understanding and, critically, the intent of the Founders and Framers of the Constitution exists.

That definition is found in the 1758 treatise, and its 1760 English translation, by Swiss attorney, jurist and international law scholar Emer de Vattel, “*Le Droit des Gens*,” or “*The Law of Nations*.” This offering will not be cluttered with tedious citations to cases and sources confirming that the Framers were aware of and relied on Vattel, but they are many. Parenthetically, your servant has addressed in a “deeper dive” analysis the 2015 essay by Messrs. Clement and Katyal [here](#), [here](#) and [here](#).



Emmerich de Vattel ([public domain](#))

In Book 1, Ch. 19, § 212 (hereafter, “§ 212”) of the Vattel treatise, a “natural born citizen” is defined as a person born in a country to two parents, *both* of whom are already citizens of that country. The definition also provides that the child’s citizenship status follows that of the father, rather than the mother. The meaning of the nbC term in our Constitution, however, and the concept the Framers intended to convey through its selection and use, have been the subject of much spirited debate, since it is not otherwise defined in the Constitution or *The Federalist*.

Insofar as the final text of the Constitution is concerned, the origin of the restriction is generally recognized to have come as a suggestion from Founder John Jay in a July 25, 1787 [letter](#) written to the Chairman of the Constitutional Convention, George Washington. In that letter, Jay stated: “Permit me to hint, whether it would not be wise and seasonable to provide a strong check to the admission of foreigners into the administration of our national government; and to declare expressly that the Command in Chief of the [A]merican army shall not be given to, nor devolve on any but a natural *born* citizen.” (underscored emphasis by Jay)

It is also generally acknowledged that the first true nbC to be elected president who was not subject to or a beneficiary of the “citizen-grandfather” clause exception in Article 2, § 1, Cl. 5 was the Republic’s eighth President, Martin Van Buren, in 1837, because prior to that time, there were no nbC’s who also satisfied the age and residency requirements of Art. 2, § 1, Cl. 5.

Moreover, it is also generally conceded by adherents to *both* sides of the debate that the prime factor and concern of the Framers motivating them to include the nbC restriction in the first place was to preclude, as much as possible, the insinuation into the new Republic’s “Chief Magistracy” – the Presidency – any and all vestiges of “foreign influence.”

As noted in [Federalist 68](#) by Publius Alexander Hamilton: “[The] most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in *foreign powers to gain an improper ascendant* in our councils. How could they better gratify this, than by raising *a creature of their own to the chief magistracy of the union?*” (Emphasis added)

While Federalist 68 dealt primarily with the Electoral College, Hamilton’s caveat regarding the potential for foreign influence infecting the presidency resided at the core of the nbC clause as finally included in the Constitution. Stated otherwise, the Framers sought to mandate in the President sole allegiance and loyalty to the United States, and to the United States *alone*. Dual, split or shared foreign allegiances were anathema to the Framers: *exclusive* fidelity was to be the permanent *sine qua non* of the office, subject only to the time-limited “citizen-grandfather” exception.

The debate over the meaning of the nbC term simmered largely unnoticed for many years following the ratification of the Constitution in 1789. Nearly a century passed before, in 1875, the Supreme Court recognized in [Minor v. Happersett](#), 88 U.S. 162, 167-168 (1875), *abrogated*, 1920 (19th Amendment) (“*Minor*”) that the Founders understood and accepted – without *any* doubt – that under the nomenclature of the time, a natural born citizen was a person born on U.S. soil to two parents who were already at that time, U.S. citizens, whether themselves “natural born” or naturalized.

While *Minor* involved women's' suffrage rather than presidential nbC eligibility, the fact that the nbC term and concept appears *only* in Art. 2, § 1, Cl. 5 – the Eligibility Clause – would strongly suggest that the unanimous (9-0) Court knew and understood that its discussion in the case of what constituted a “natural-born citizen” would have impact beyond the suffrage issue.

On the other hand, as to the purported nbC status of those born here to foreigners or aliens, the Court acknowledged that while some authorities contended that foreign parentage did not matter, it specifically noted that there had been “doubts” as to those persons' purported natural born citizen status, but clearly adding that there had “*never*” been such doubts as to the first category, *i.e.*, those born here to a mother and father both of whom were already at the moment of their child's birth U.S. citizens.

This recognition mirrors, without direct citation, the principles of Vattel's § 212. The abrogation of the *Minor* decision by the 19th Amendment in 1920 was in response to the main issue in the case, *i.e.*, the denial of suffrage to women by the Missouri constitution, despite the 14th Amendment, instead of the Court's discussion of who the Framers believed was a nbC, which statement remains “on the books” to this day.

However, another subsequent Supreme Court case, [*United States v. Wong Kim Ark*](#), 169 U.S. 649 (1898) (“*WKA*”), decided 23 years after *Minor*, held that mere birth here, regardless of parental U.S. citizenship, but born to lawful permanent resident aliens, renders one a “citizen” under the 14th Amendment. But the 6-2 split *WKA* decision adjudicated *nothing* about nbC eligibility under Art. 2, § 1, Cl. 5. Most if not all “Vattel Deniers” contend that the *WKA* decision “settles” the nbC question and that challenges to the nbC issue discussed in it are “conspiracy theories” to be rejected or subjected to the directive to “move along..., nothing to see here.”

Critically, this “move along” admonition also completely ignores the fact that the *WKA* majority opinion by Associate Justice Horace Gray flatly misstates the legislative history of two statutes enacted by the First Congress, 1 Stat. 103 (1790) and 1 Stat. 414 (1795). Your servant has addressed this manifest error [here](#).

Those two *naturalization* statutes bear *directly* on the original intent of the Congress regarding who might be “considered” in 1790 to be a “natural born citizen” and who were thereafter *recognized* (1795) to be a “citizen,” but *not* a “natural born citizen.” The 1795 law repealed, *in toto* – rather than, as claimed by Justice Gray “re-enacted in the same words...,” (*see WKA*, 169 U.S. at 672-673) – the 1790 law.

United States Congress, "An act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject," January 29, 1795

For carrying into complete effect the power given by the constitution, to establish an uniform rule of naturalization throughout the United States:

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise: --

First. He shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the states, or of the territories northwest or south of the river Ohio, or a circuit or district court of the United States, three years, at least, before his

<https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/naturalization-acts-of-1790-and-1795>

That error has never been acknowledged or corrected by the Court, but the import of Justice Gray's misstatement is repeated and mistakenly ratified in both the Clement-Katyal 2015 essay as well as in Senate Resolution 511 (2008), purporting improperly to "confirm" the nbC status of then-Senator John McCain. Parenthetically, then-Senator Barack Obama (as well as then-Senator Hillary Clinton) co-sponsored Sen. Res. 511.

The 1795 repeal of 1 Stat. 103 was most likely because Congress recognized, a mere five years later, that it could not via a *naturalization* statute amend or expand the nbC restriction of the Constitution's Eligibility Clause. See Christina S. Lohman, [*Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*](#), 36 Gonz. L. Rev. 349, 372-373 (2000/01). Only a formal, ratified constitutional amendment can properly amend the Constitution. Moreover, the nbC concept set out in 1 Stat. 103 has *not*, as claimed in the Clement-Katyal article, "remained constant" to the present. Indeed, that error, and its underlying rationale, was corrected by Congress in 1795 when 1 Stat. 414 repealed 1 Stat. 103.

Thus, the conundrum persists as to who can be – and who cannot be – a nbC as contemplated by the Founders and tangentially addressed by the Supreme Court. The offering you are reading posits that the Founders adopted the Vattel § 212 definition and that mere birth here – or in certain circumstances beyond our geographic borders, as with Senators John McCain (Panama) or Ted Cruz (Canada), and regardless of *both* parents' U.S. citizenship – is insufficient to render one a nbC, at least as contemplated and intended by the Framers as contrasted with today's "experts."

Parenthetically, all of the discussion of the nbC issue in the *WKA* majority opinion has been deemed to be “dictum, 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, Washington, D.C.

United States v. Wong Kim Ark



Supreme Court of the United States

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

Full case name	<i>United States v. Wong Kim Ark</i>
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.

Credit: [Wikipedia](#)

In candor, virtually all of the appellate court opinions, administrative law decisions, law review articles, reports and memoranda of the Congressional Research Service (“CRS”) and articles by former U.S. Solicitors General – not to mention most pieces in the mainstream media – have eagerly adopted the *WKA* model and have rejected the *Minor/Vattel* § 212 approach. Not coincidentally, this “*WKA*” approach fortified the argument that Barack Hussein Obama, II qualified as a nbC when he ran for president in 2008 and 2012.

And yes, these same principles apply to Vice President Kamala Harris, whose § 212 nbC *bona fides* remain in deep doubt because neither of her parents – and in particular, her father – was a U.S. citizen at her birth. While the argument can be made that she is a 14th Amendment “citizen,” she does not qualify as a nbC under § 212, at least if one accepts that the Framers adopted the *Vattel* definition. Under the decision in *Minor*, it is a virtual certainty that, indeed, the Framers adopted that definition, making Kamala Devi Harris a 14th Amendment “citizen,” but *not* an Eligibility Clause natural born Citizen.

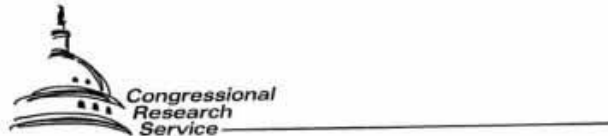
Accordingly, the conclusion in the Clement-Katyal article that “[t]hus, an individual born to a U.S. citizen parent – whether in California or Canada or the Canal Zone – is a U.S. citizen from birth and is fully eligible to serve as President if the people so choose...” can in any event have *zero* application to Kamala Harris, even *if* the relaxed definitional narrative of a nbC in the article were to be accepted.

Quite apart from myriad questions regarding the “authentic” or purportedly “fraudulent” nature of Mr. Obama’s Hawai’ian birth certificate – even assuming its authenticity – the certificate itself confirms that his father, Barack Hussein Obama, Sr., was a citizen of Kenya, not the United States, when the son was born. The son was a “citizen at birth” because of the 14th Amendment, as interpreted by the *WKA* case and because his mother, Stanley Ann Dunham Obama, was a U.S. citizen, although her age at his birth in 1961 clouds the issue of his derivative “citizenship,” making his purported status as a nbC also somewhat less than crystal clear.

In this regard, it is also important to note that the CRS has on several occasions produced either “memoranda” or formal “reports” for dissemination to all 535 members of Congress addressing the nbC issue. In this regard, the mission of the CRS is [stated](#) to be the making available to the Congress of “24/7 access to the nation’s best thinking.”

Unsurprisingly, each of the CRS “products” on the nbC issue has adopted, in general, the *WKA* and/or Clement-Katyal nbC definitional narrative rather than the *Minor/Vattel* § 212 definition. Unsurprisingly as well, few if any members of Congress – either in the Senate or the House and on either side of the aisle – have taken the time to objectively analyze, much less “drill down” into the CRS products, to assess their accuracy or “best thinking” index score.

Source: 5 Nov 2010 posting at <http://puzo1.blogspot.com/2010/11/members-of-congress-memo-what-to-tell.html>



MEMORANDUM

April 3, 2009

Subject: Qualifications for the Office of President of the United States and Legal Challenges to the Eligibility of a Candidate

From: Jack Maskell
Legislative Attorney
American Law Division

This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum addresses inquiries from congressional offices regarding the constitutional qualifications for the office of President of the United States, and the issue of challenges concerning specifically the questioning of President Obama’s “natural born citizenship” status.¹ Many of the inquiries have questioned why then-Senator, and now President, Obama has not had to produce an original, so-called “long” version of a “birth certificate” from the State of Hawaii, how federal candidates are “vetted” for qualifications generally, and have asked for an assessment of the various allegations and claims of non-eligibility status.

<https://www.scribd.com/doc/41131059/CRS-Congressional-Internal-Memo-What-to-Tell-Your-Constituents-Regarding-Obama-Eligibility-Questions>

Oddly, however, in one of the first of these documents – [CRS Memo](#) dated April 3, 2009, 7-5700, the CRS author, seemingly in support of the argument that the “two-parent” requirement found in *Vattel*’s § 212 was purportedly *not* adopted by the Framers, cites a Supreme Court opinion which, in turn, quotes from an 1875 U.S. Attorney General “letter of advice” written by then-Attorney General Edwards Pierrepont to then-Secretary of State Hamilton Fish.

That unrelated letter of advice formed the basis in the 2009 CRS memo for the contention that the son of a father who was purportedly a German national – rather than a U.S. citizen when the son was born in St. Louis, Missouri – was nonetheless eligible to the presidency as a nbC. The CRS author cites in support of that claim the Supreme Court’s decision in [Perkins v. Elg](#), 307 U.S. 325 (1939).

Problematically, however, an ellipsis omission of words from a quote appearing in the original Supreme Court opinion results in the appearance in the 2009 CRS memorandum of the false claim that the father was a German national, rather than a U.S. citizen, when the son was born here. Specifically, the CRS author omits by ellipsis reader signal the Supreme Court’s words “was naturalized in 1854...,” thus substantively altering the words – and also the *meaning* – of language the Supreme Court was accurately quoting from the prior 1875 unrelated Pierrepont “letter of advice.” See *Elg* at 330 and *compare* the 2009 CRS memo at 13.

As a consequence, the CRS memorandum – distributed to all members of Congress as an example of the “best thinking” on the issue – made it appear that the son of a foreign father could nonetheless be deemed to be a nbC eligible to the presidency. No doubt coincidentally, that linguistically altered conclusion conveniently fit the situation of one Barack Hussein Obama II in 1961, when he was born, and in 2009, during his first term as president.

As it turns out, the father in the Pierrepont letter of advice – one “A. Steinkauler” – who was in fact “naturalized in 1854...,” was in reality a U.S. citizen, and married to a U.S. citizen wife/mother, making his 1855 Missouri-born son a nbC, even under the Vattel § 212 definition. Stated otherwise, the CRS ellipsis left the false impression that the Supreme Court’s *Elg* decision stated that the father was *not* a U.S. citizen when his son was born in St. Louis, when in fact, just the *opposite* was true.



Qualifications for President and the “Natural Born” Citizenship Eligibility Requirement

Jack Maskell
Legislative Attorney

November 14, 2011

However, further compounding the illusion, in 2011, the CRS issued an “updated” [Report, R42097](#), *repeating* the 2009 ellipsis omission in the quote from the *Elg* case. Similarly, the 2011 Report gave no explanation for the ellipsis. However, the same conclusion – that a person born here to a non-U.S. citizen father would still be eligible to the presidency – was

through the report made available and communicated to all members of Congress and, parenthetically, to all members of the Supreme Court via “collegial” exchanges, thus wrongly *misinforming* readers that the Court had in 1939 already ruled – purportedly – on the issue in *Elg*. In reality, it had done *no such thing*.

Thus, the Congress was again left with the impression – from the claimed repository of the “nation’s best thinking” – that the Supreme Court in *Elg* had in 1939 ruled that even if a person’s father was not a U.S. citizen when the person was born here, the person was nonetheless eligible to the presidency as a nbC. And eagerly, the Congress accepted the CRS representation.

But wait..., there’s more.

On Jan. 11, 2016, in the last year of President Obama’s second term, the CRS issued yet another revised and “updated” [CRS Report R42097](#). Note that the Jan. 11, 2016 CRS Report is now accessible only at “everycrsreport.com” and *not* on the official CRS website, where attempts to access the 2016 report automatically redirect the searcher to the Nov. 14, 2011 report.

This time it took the form of a formal report, again intended for dissemination to all members of Congress, where the prior 2009 and 2011 discussions of the *Elg* decision – including its ellipsis anomalies..., were *erased*. Or, in contemporary lexicon, “scrubbed” from the electronic versions of the 2009 memorandum and 2011 report.

As a result, the original actual language of the Supreme Court regarding the 1875 Pierrepont letter, *accurately* quoting it, was restored, making it appear that the 2009 and 2011 ellipsis alterations of the Supreme Court’s quote previously appearing in the 2009 and 2011 CRS products... “*never happened*.” In essence, one could leap to the conclusion that it was a clumsy reverse “Memory-holing” of the ellipsis. There are no doubt explanations for these ellipsis alterations and erasures, yet they are not immediately apparent.

And whether or not the ellipsis anomalies – and their subsequent erasure – were innocuous and inadvertent is a question for others to decide. However, the effect on the casual reader – including 535 members of Congress and their staffs – should be a matter beyond debate. Moreover, because the people supporting the WKA “be-all-end-all” dictum and *ipse dixit* conclusions from a case involving exclusively the question of the 14th Amendment and *not* Art. 2, § 1, Cl. 5 – coupled with the reasoning of the Clement-Katyal article – provide a “close-enough-for-government-work” nbC definition, the “move along..., nothing to see here” option presents a comfortable if intellectually flawed “safe harbor” landing pad.

That said, one must still ponder the issue against a backdrop of several “inconvenient” yet obvious facts:

1. As confirmed by Publius Alexander Hamilton in Federalist 68, the Founders sought to erect the *highest* available barrier to the potential for the insinuation of foreign influence into the “chief magistracy” – the presidency – of the new Republic, selecting the term “natural born Citizen” as a strong restriction on eligibility as “hinted” by John Jay in his July 25, 1787 letter to Constitutional Convention Chair George Washington;

2. The highest available barrier in 1787 to the potential for the insinuation of foreign influence into the presidency was that found in § 212, defining a “natural born citizen” as a person born on the soil of a country to parents *both* of whom were already citizens of that country;
3. The U.S. Supreme Court stated in *Minor* that the Founders understood, under the nomenclature of the time and without *any* doubt, that a person born here to parents *both* of whom were already U.S. citizens was a “natural born citizen,” but also adding the caveat that as to whether the same status could properly be accorded to persons born here regardless of their parents’ citizenship, there were “doubts;”
4. A definition of a nbC which accords nbC status to persons born anywhere, even beyond U.S. soil, if only one or the other parent – but not necessarily both, either of which might be a dual citizen – is a U.S. citizen, producing a “citizen at birth” or a “citizen by birth,” presents a much *lower* barrier to the potential for insinuation of foreign influence into the presidency than does a *higher* barrier incorporating the Vattel § 212 nbC definition, which ensures *exclusive and undivided* allegiance to the United States, and the United States *alone*;
5. It defies logic – and in factual reality is *both* illogical and counterintuitive – to accept that the Framers would have consciously and intentionally adopted a *lower* “foreign influence insinuation” barrier when a known, *higher* barrier existed and in particular one which, as confirmed by the Supreme Court in *Minor*, had always been in the Founders’ view free of *any* “doubt” as to its import or meaning.

CONCLUSION

Unless and until the Supreme Court accepts jurisdiction over a ripe, live “case or controversy” involving a litigant with sufficient “standing” to bring and maintain a case questioning the nbC status of a candidate for (or a sitting occupant of) the offices of the presidency and/or the vice presidency, the issue will remain “settled” only in the minds of the aforementioned scholars, academics, lawyers and non-Supreme Court Justices, along with their allies in the mainstream media.



<https://www.youtube.com/watch?v=Sco3igZmHXQ>

Clearly, persons possessed of litigant standing to bring these issues into court include Donald J. Trump and Speaker of the House Michael Johnson. However, the incandescent “hot potato” nature of the issue would likely put a quick political wet blanket on any direct effort by either of them to bring such a challenge themselves. They both may be patriots, but they are also human beings not immune to political realities. Still, the potential should be brought to their respective attentions. And for the time being, it would appear that the Court intends to continue “[evading](#)” the issue. Sadly as well, most people just don’t care about the topic.

Finally, as for the assurance in the Clement-Katyal article that “the Constitution is *refreshingly clear* on these eligibility issues...,” thus purportedly obviating the need to waste time “dealing with specious objections to candidate eligibility...,” again, most respectfully, where in the Constitution can one find a “refreshingly clear” definition of a nbC that meets the Framers’ “foreign influence” concerns?

The Court in *Minor* could not find one, but maybe it is hidden away somewhere beneath a constitutional “penumbra.” Or perhaps at some future point in time, it will reveal itself as a constitutional “emanation.” Until then, the conundrum and general electorate indifference will likely persist. Lamentable, but a sign of the times.

Soooo..., against this backdrop of empirical facts, let the cocktail party and barbecue “discussions” begin. And here’s a *P&E* public service announcement: November 5, 2024 is now roughly only three months away.