The Succession Issue

by Joseph DeMaio, ©2023

§19. Vacancy in offices of both President and Vice President; officers eligible to act

(a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that-

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue

https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title3-section19&num=0&edition=prelim

(Aug. 9, 2023) — Sadly, the time has come for the Republic to prepare for a possible political upheaval not seen since the Civil War. As the Clown at 1600 often states: that is a fact…, not hyperbole. While the events precipitating the crisis might not occur today or tomorrow, circumstances suggest a growing likelihood that it ***will*** occur at some point in the not-too-distant future, mandating addressing the issue ***now***, before it bursts into the headlines. These are difficult times.

Whether he was lawfully elected to the presidency or merely inserted there through voting fraud and media election interference is now irrelevant: the Goofball occupies the office of President of the United States of America, the most powerful and consequential one on the planet. And because he is never more than a few feet away from the nuclear football, this is a growing concern.

Brandon is an incompetent, prevaricating and devious human being who at any waking moment could plunge the nation into cataclysmic war with a misreading of his teleprompter or an addled slip of the tongue. And the potential for such an "ooops" is the same, if not worse, with Kamala ("Word Salad Queen") Harris. Words are important, so they must be selected and used carefully, ***very*** carefully, especially by those with access to nuclear launch codes…, no mulligans allowed.

But the real "clear and present danger" to the nation lies in the fact that Brandon is nearing 81 years old, and quite apart from his mental acuity, his physical condition telegraphs on a daily – and sometimes hourly – basis that he may without warning topple over, stumble, fall and crack his head open. If that happens and results in a fatal injury, § 1 of the 25th Amendment provides that the "Vice President shall become the President."

On the other hand, if his injuries from any such mishap are debilitating or even completely disabling – as, for example, with a major but non-fatal heart attack or stroke – § 3 of the Amendment also provides that, upon transmitting a written declaration of his

inability to "discharge the powers and duties of his office" to the president *pro tempore* of the Senate (now, Senator Patty Murray [D. WA] and the Speaker of the House (now, Rep. Kevin McCarthy [R. CA]), (Kevin McCarthy – Wikipedia)) then "such powers and duties shall be discharged by the Vice President as Acting President."

The language of the amendment is clear. The person assuming the "powers and duties" of the office does so only as "Acting President" until a new, subsequently duly-elected president is sworn in or, in the meantime, the "Acting President" for one reason or another is himself/herself declared either ineligible or is similarly injured or debilitated. In that event, federal law, discussed hereafter, would be activated.

Under this scenario, it is at this juncture that a monumental constitutional question could arise. That question would decidedly ***not*** be whether Kamala Harris's "word salad" style of governing is preferable to the incompetent and deceitful style of Brandon. Rather, the specific question coming "front and center" would be: is Kamala Harris constitutionally eligible to continue serving as Vice-President or ascending to the office of the presidency as the "Acting President?"

Recall that the 12th Amendment mandates that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." Accordingly, unless it is shown that Kamala Harris is constitutionally eligible to first serve as Vice-President, she would be ineligible to serve as "Acting President" under the 25th Amendment. Stated otherwise, to paraphrase Hamlet: "To be, or not to be the Acting President…, that is the question."

"RIPE FOR ADJUDICATION"

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(Aug. 13, 2020) — OK, faithful P&E readers, buckle up, because here we go again on that super-duper, stomach-churning, mind-bending roller coaster ride called: eligibility as a "natural born Citizen" under the Constitution. However, unlike the prior experience dealing with the issue only from the perspective of the presidency under Art. 2, § 1, Cl. 5 and involving the Second Usurper in

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https://www.thepostemail.com/2020/08/13/kamala-devi-harris-vs-the-12th-amendment/

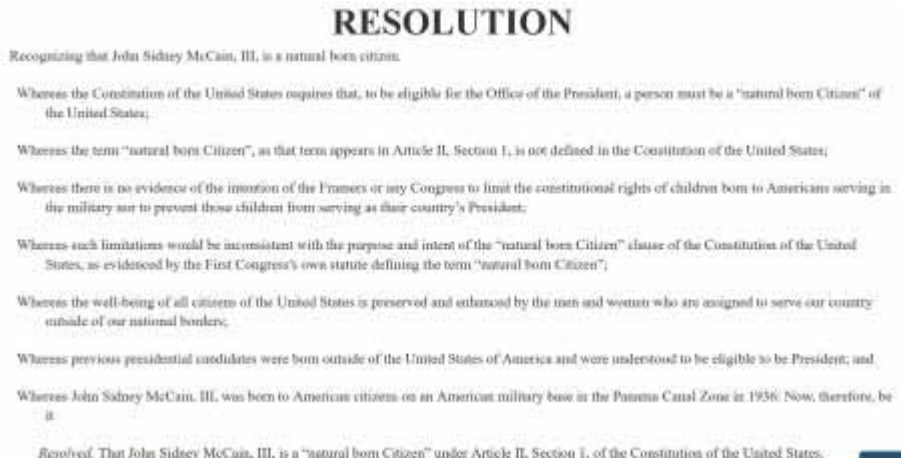
As faithful *P&E* readers are well aware, your humble servant believes that Kamala Devi Harris is now and always has been constitutionally ineligible to serve as Vice-President, as posited here; here; here; and here. This status, of course, arises because although she was born in Oakland, California, neither her mother nor her father was a U.S. citizen at the time of her birth. Under Art. 2, § 1, Cl. 5 of the Constitution, today, only a "natural born Citizen" ("nbC") is eligible to either the presidency or the vice-presidency.

Your servant further believes and posits that in crafting the Constitution's nbC restriction, the Founders adopted the definition set forth in the 1758 edition of the scholarly and seminal legal treatise by Swiss attorney, jurist and international law scholar Emer de Vattel, *The Law of Nations*. There, in Book 1, Ch. 19, § 212, de Vattel states that "natural-born citizens, are those born in the country, ***of parents who are citizens***." (Emphasis added)

Your servant has also posited that this is the definition understood, ratified and confirmed as being adopted by the Founders as discussed by the U.S. Supreme Court in *Minor v. Happersett*, 88 U.S. 162 (1875), *abrogated by* the 19th Amendment (1920). Also asserted is the fact that the Supreme Court, as recently as June, 2023, has cited with approval de Vattel and his treatise, albeit not directly acknowledging the principles set out in § 212.

That said, your servant also acknowledges that his view is not shared by everyone. Others claim that if one is merely a "citizen at birth" or a "citizen by birth," regardless of place of birth or U.S. citizen status of both parents at the time of birth, under the Supreme Court decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) ("*WKA*"), such is "good enough" to constitute one a "natural born Citizen" under the Constitution's nbC Eligibility Clause. This is the official position of the Congressional Research Service, notwithstanding its muddy and deceptive reasoning discussed here and here.

Adherents to this "de Vattel Denier" view supplement their position by citing the purported "intent" of the First Congress in enacting, in 1790, 1 Stat. 103. That law declared children of U.S. citizen parents born "beyond sea" to be "considered as natural born citizens," but the de Vattel Deniers dismiss as irrelevant the fact that the law was repealed in 1795 by 1 Stat. 414.



RESOLUTION

Recognizing that John Sidney McCain, III, is a natural born citizen.

Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a "natural born Citizen" of the United States;

Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;

Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children from serving as their country's President;

Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen";

Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders;

Whereas previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President; and

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936: Now, therefore, be it

Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

https://www.govtrack.us/congress/bills/110/sres511/text

In fact, undaunted by that repeal, the U.S. Senate in 2008, by unanimous consent, passed Senate Resolution 511 in support of the purported nbC status of Senator John McCain. The resolution incorporated as part of its "whereas" factual rationale the "considered as

natural born citizens" language of 1 Stat. 103, despite its repeal 213 years earlier, discussed here. So much for the intellectual acumen of "the greatest deliberative body in the world."

The Supreme Court has never directly addressed the nbC presidential eligibility question in a "ripe" "case or controversy" involving parties with "standing." While many attempts have been made over the years challenging the nbC eligibility *bona fides* of, among others, Barack Hussein Obama, John McCain and Kamala Harris, virtually all have been rejected on the grounds that the plaintiff(s) making the challenge lacked the requisite litigant standing to bring or maintain the action. The legal concept of standing is generally defined as possessing a particularized and actual "stake in the outcome" of the litigation, rather than a mere "generalized" interest in the result shared in common with everyone else.

Guess who, faithful *P&E* readers, is the one person who would, under either of the two above succession scenarios – a fatal or a disabling injury – possess the requisite litigant standing? That's right, Virginia: the Speaker of the House, Kevin McCarthy. While it is a virtual certainty that his parents were already U.S. citizens when he was born in Bakersfield, California in 1965, he too would need to prove his nbC status in order to serve if Harris were to be disqualified.

Under the Constitution, the line of succession with regard to the presidency is limited to the Vice-President. On the other hand, if both the President and Vice-President are, for one reason or another, unable to serve, federal law – the Presidential Succession Act, 3 U.S.C. § 19 – establishes the line of succession beyond the Vice-President.

The line begins with the Speaker of the House, then shifts to the President *pro tempore* of the Senate and on down through the heads of the various Executive Branch Cabinet departments in the order of their creation, now ending with the Department of Homeland Security. President Mayorkas? Yikes. Even the unlikely potential for that is cause for panic and alarm.

But back to text.

On the possibility that Kamala Harris would at some future moment be called upon to function under the 25th Amendment as the Acting President, Speaker McCarthy should ***yesterday*** have been instructing his aides and attorneys to be drafting a precautionary complaint challenging her nbC *bona fides*. The complaint could be (but likely should not be) framed as one seeking declaratory relief only, where no action is ordered and only the status of the parties – McCarthy and Harris – is judicially declared. The better path is one seeking an order specifically holding her ineligible as being other than a natural born Citizen.

Quite apart from his own political aspirations – recalling he persisted in seeking to become the House Speaker through 15 rounds of voting spread over four days to secure the position, – he owes it to the Republic to make the challenge if the need arises.

He also owes it to the Founders and the Constitution, because it is perhaps the ***only*** way that a definitive answer to the nbC eligibility question will ever be finally answered by the Supreme Court …, if answered at all. Vice-President Mike Pence once had the chance…, and we all know how that turned out.

Today, the issue remains debated by competing attorneys, media-types and internet pontificators. This is hardly a prudent way to finally establish what the Founders intended when drafting the Constitution. And, by the way, if you thought Brandon was being controlled by his marionette masters, wait until you see how Harris would be manipulated.

Ever since the 1803 decision in *Marbury v. Madison*, the Supreme Court has asserted that it has the final authority to interpret the Constitution. Many disagree with that conclusion, some advocating that the Constitution is a "living, breathing and evolving" document subject to changing meanings and mores as the culture changes with the passage of time. Wrong: that is why Article V of the document, governing amendments, exists.

But until *Marbury* is overruled or abrogated, it stands as binding precedent. The nbC "eligibility buck" stops in the courtroom of the building at One First Street, NE, Washington, D.C., and not at Harvard; Yale; Princeton; Columbia; the Congressional Research Service; the WaPo; the Gray Trollop; or CNN.

In the normal course of events, if McCarthy undertook the challenge, the complaint would first be filed in the U.S. District Court for the District of Columbia, with an appeal by the losing party to the U.S. Court of Appeals for the District of Columbia Circuit and thereafter, by writ of certiorari, to the U.S. Supreme Court.

But because of the exigencies of the situation, it is not altogether beyond possible that the Supreme Court would entertain a petition for an extraordinary writ under its Rule 20, including perhaps even a writ of *quo warranto*. If such a writ were sought and ordered, it would require Harris to establish her authority to serve as Vice-President, thereby requiring her to also prove her purported constitutional nbC status.

As with any highly debated issue, however, the Court may fall back on its continued policy of "evading" the question, as suggested many years ago by Justice Thomas. Or it might simply turn away any effort by McCarthy to "open a Pandora's Box" by declaring the matter to be a non-justiciable "separation of powers" or "political question" issue beyond its jurisdiction. Or it just might wish to avoid another upheaval as followed its overruling of *Roe v. Wade.*

On the other hand – stranger things have happened, but they are few and far between – the Court could summarily slap McCarthy down and declare that, under its prior *WKA* decision and the "thoughtful and comprehensive" analyses of former Solicitors General of the United States, Harris is an eligible nbC.

As to the potential for a decision declaring her constitutionally ineligible to ***either*** the office of the President or the Acting President, memo to Mr. McCarthy: if no real effort is

made to challenge her, the political reality is that the nation will likely have its first ineligible female Salad Queen Acting President. Scary. And avoidable.

At the "end of the day," the issue boils down to whether in the event of a fatal or disabling injury arising in the Commander-in-Chief, thus bringing the question to a front burner, Speaker McCarthy will step up and pay the debt owed to the Republic. Your humble servant believes he should, if for no other reason than to elicit from the Court a definition of a "natural born Citizen" for future eligibility controversies.

But while the argument can be made that McCarthy ***should*** make the effort, he does work, after all, in Washington, D.C., where powerful forces pressure people to "go with the flow" and "not make waves." As President, Donald Trump made a lot of waves – not to mention some tsunamis – which explains why Beltway denizens detest him with such vigor and virulence.

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Moreover, the dithering and delay thus far exhibited by Speaker McCarthy regarding articles of impeachment against Brandon and other members of his cabinet – having been "slow-walked" since the first day he assumed the speakership – does not instill optimism that he would engage in the far more radioactive move of challenging Harris's claimed nbC status. Even today, a mere "impeachment ***inquiry***," let alone a formal bill of impeachment, remains in his mind only a "possibility." Sad. Not much better than "Move along, folks…, nothing to see here."

In the District of Columbia, a politician of whatever political affiliation can "go along to get along," get rich…, and perpetuate the downward spiral infecting the Republic. On the other hand, one can "make waves" and try to correct the ugly trajectory that certain past and current administrations – including its Vice-President – have placed it upon. Clearly, a challenge to the nbC *bona fides* of Kamala Devi Harris by Speaker McCarthy would not be consistent with "going along to get along." Nor would it be for the faint of heart.

That said, there are far too few backbones in D.C. and far too many backstabbers…, not to mention random lootings, car-jackings and murders. The time has long passed to take decisive, corrective action. As the saying goes: "Actions speak louder than words."

It will be interesting to see what McCarthy does (or does not do) in the event the need arises. This could be the test that Ben Franklin predicted: will we be able to keep the Republic? Who knows?

But ask yourself this: what would the Founders do?