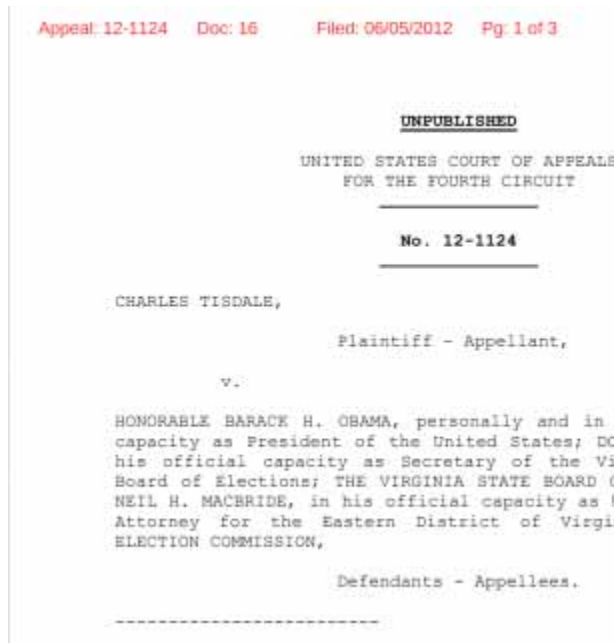


The Tisdale Mirage

"UNPUBLISHED OPINIONS"

by [Joseph DeMaio](#), ©2021



[tisdale_ac_order.pdf \(fec.gov\)](#)

(Jun. 17, 2021) — As your humble servant’s favorite former Democrat, [Ronald Reagan](#), quipped when debating and dismantling Water Mondale’s doomed 1980 presidential [campaign](#): “There you go again...” President Reagan’s timeless observation has renewed relevance as your servant composes this response to comments from “Wilson” and “Luke” regarding the matters set out [here](#).

Specifically, both Wilson and Luke seem disturbingly fixated on the assertion made by your servant that no federal district court or circuit court of appeal decision exists which properly analyzes and substantively explains why a native born “citizen” under the 14th Amendment is the equivalent of a “natural born Citizen” as required by Art. 2, § 1, Cl. 5 of the Constitution.

Wilson claims that “if one desires federal authority [on the point], there is always *Tisdale v. Obama*, No. 12-00036 (E.D. Va. 2012), *aff’d*, 473 F. App’x 203 (4th Cir. 2012).” Luke chimes in with a lengthy cut-‘n-paste of the *Tisdale* district court “order” (ahem... not a “judgment”...), including all of its typos, mis-citations and ellipsis omissions, before offering: “Hope this is helpful to you and Mr. Laity. Since Vice President Harris was born in California, it appears likely the decision in *Laity v. Harris* will yield the same result, given the underlying premise of Mr. Laity’s claim.”

Given the shallow analysis of *Tisdale* heretofore rendered by most courts, Luke's prediction will probably come to pass..., an event not to be confused with being the correct one. Faithful P&E readers, insert here President Reagan's timeless quote, then proceed with the rest of this offering.

First, neither the Wilson nor Luke comments note that the two rulings in *Tisdale* – the Jan. 23, 2012 “order” of [dismissal](#) by Judge John Gibney, Jr. of the Eastern District of Virginia District Court or the June 5, 2012 [opinion](#) of the Fourth Circuit – are unreported or unpublished opinions.

Indeed, emblazoned across the top of the first page of the Fourth Circuit appellate review opinion is the capitalized and underlined word “UNPUBLISHED.” Of greater significance, preceding the actual text of the “*per curiam*” (“no-judge-wants-his/her-name-to-appear-on-it”) opinion is the additional caveat from the court: “Unpublished opinions are not binding precedent in this circuit.” Some might argue that this is a relevant restriction worthy of notice ..., no? Others..., not so much.

Second, apart from the fact that Judge Gibney was appointed by Barack Hussein Obama, Jr.; and apart from the fact that Judge Gibney did not recuse himself; and apart from the fact that Fourth Circuit Judges Robert King (a Clinton appointee), Allyson Duncan (a Bush II appointee) and Judge Albert Diaz (an Obama appointee) did not recuse on the appeal of Judge Gibney's “order;” and apart from the fact that the Fourth Circuit unpublished decision finds “no reversible error” in affirming the dismissal “for the reasons stated by the district court,” according to the Wilson and Luke comments, the results in *Tisdale* should be sufficient “federal authority” to establish that a 14th Amendment “citizen” is the equivalent of an Art. 2, § 1, Cl. 5 “natural born Citizen.”

This, faithful readers, is what now passes for in-depth analysis of the eligibility issue. Nonsense.

To begin with, the Wilson and Luke comments extoling the *Tisdale* rulings would not (or should not) pass muster with even a first-year law school dropout..., depending, of course, on the pedigree of the law school. One need look no farther than the Fourth Circuit's declaration that “[u]npublished opinions are not binding precedent in this circuit” to understand that its “*per curiam*” ruling – both adopting and affirming Judge Gibney's “order” of dismissal – does **not** constitute binding precedent. One is tempted to ask whether Wilson and Luke have access to competent optometrists.

And while the *per curiam* Fourth Circuit *Tisdale* opinion qualifies the limited scope of “unpublished opinions” in the Fourth Circuit, the Wilson and Luke comments seem to presuppose that, while not binding in the Fourth Circuit, somehow the opinion should be accorded binding “federal authority” precedential weight everywhere else in the United States, from the U.S. Supreme Court on down to, for example, administrative law judges and hearing officers in [New Jersey and Pennsylvania](#)? Really?

Moreover, by adopting the “reasoning” of the *Tisdale* district court’s dismissal order, the Fourth Circuit opinion also unavoidably adopts – and thus falls victim to — its errors and omissions. The district court’s typographical errors and mis-citations, while not substantive, are bothersome and suggest something short of a careful and analytical attention to detail normally expected of U.S. district court judges.

Specifically, the title of the Supreme Court [case](#) is “*United States v. Wong Kim Ark*,” not “*United States v. Ark*.” The title of the federal court of appeals case is “[Perkins v. Elg](#),” not “*Perkis v. Elg*.” And the complete citation to the *Elg* case should include reference to its [modification](#) and affirmation on appeal by *certiorari* in the U.S. Supreme Court: *Perkins v. Elg*, 307 U.S. 325 (1939).

As to the U.S. Supreme Court decision in *Perkins v. Elg*, faithful P&E readers will recall (not sure about Wilson or Luke) that the linguistic chicanery via ellipsis omission by the Congressional Research Service (“CRS”) of a critical date in the actual *Elg* reported opinion – discussed in detail by your humble servant [here](#) and [here](#) – and its magical reappearance years later [here](#) – may have contributed in no small measure to the likely false conclusion that Barack Hussein Obama, Jr. was, purportedly, a “natural born Citizen” eligible to the presidency.

And, by the way, both Marie Elg and Steinkauler the Younger, major players in the *Elg* decision, were natural born Citizens, despite the efforts of the Congressional Research Service to portray them as merely “native born” offspring of foreign national parents nonetheless eligible to the presidency. Who knew? If you were a P&E reader, the answer was clear: you knew.

On a more substantive note – reader alert, including Wilson and Luke: reach for a caffeinated beverage, as what follows is a bit convoluted – the district court *Tisdale* ruling adopted and affirmed by the Fourth Circuit alters the language of the quote it partially extracts from [Hollander v. McCain](#), 566 F. Supp. 2d 63, 66 (D.N.H. 2008). The alteration is subtle, but significant.

Specifically, the *Tisdale* district court order quotes from the *Hollander* decision thusly: “those born ‘in the United States, and subject to the jurisdiction thereof,’ ... have been considered American citizens under American law in effect since the time of the founding ... and thus eligible for the presidency.” Here, the district court’s order ends the sentence being attributed to *Hollander* with a “period” rather than the “comma” which appears in the original *Hollander* opinion. Stated otherwise, the *Tisdale* order cites and partially quotes *Hollander*, but leaves off the citation to [Schneider v. Rusk](#), 377 U.S. 163 (1964).

Schneider makes it clear that with regard to the preceding portion of its quote – omitted from the *Tisdale* district court ruling – although a **native-born** person is a “citizen” by virtue of the 14th Amendment, that person does **not** stand on the same footing as a “**natural born**” citizen when the issue is that of presidential (or, via the 12th Amendment, vice-presidential) eligibility. Recall as well that while all natural born Citizens are also,

by virtue of their birth here, “native-born” citizens, not all native-born citizens are “natural born” citizens. Think [Venn diagrams](#). This is the unambiguous teaching of *Schneider*.

**Schneider v. Rusk (377 U.S. 163) —
Opinion of the Court**

William O. Douglas



Source: [Schneider v. Rusk \(377 U.S. 163\)/Opinion of the Court – Wikisource, the free online library](#)

In fact, the complete quote from *Hollander* – without the ellipsis omissions and the “comma-to-period” alteration found in the *Tisdale* dismissal order – reads as follows: “Those born ‘in the United States, and subject to the jurisdiction thereof,’ U.S. Const., amend. XIV, have been considered American citizens under American law in effect since the time of the founding, [United States v. Wong Kim Ark, 169 U.S. 649, 674–75, 18 S.Ct. 456, 42 L.Ed. 890 \(1898\)](#), and thus eligible for the presidency, *see, e.g., Schneider v. Rusk, 377 U.S. 163, 165, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964)* (dicta).”

The critical part of the above quoted actual language from the *Hollander* opinion is the parenthesized word “(dicta)” following the “*see, e.g.*” reader signal directing attention to the Supreme Court decision in *Schneider*. As astute P&E readers are well aware, “dicta” are side comments made by a court having no impact or bearing on the actual “holding” of a court on the facts coming before it.

If one goes to the original *Schneider* decision, one finds that the Supreme Court there held: “We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that ***only the ‘natural born’ citizen is eligible to be President. Art. II, s [§] 1.***” (Emphasis added)

The *Schneider* Court then goes on to state: “While the rights of citizenship of the native born derive from s [§] 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, ***apart from the exception noted***, ‘becomes a member of the society, possessing all the

rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The [C]onstitution does not authorize Congress to enlarge or abridge those rights. *The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.*” (Citations omitted, emphasis added).

While Congress can “naturalize” persons to become U.S. “citizens,” only the Constitution controls who can be – and who cannot be – a “natural born Citizen.” It is that simple.

It is therefore clear that the Court in *Schneider* articulated the proposition that, insofar as the “citizenship” of persons born in the United States is concerned, that status derives from the 14th Amendment and *not* from Art. 2, § 1, Cl. 5, the presidential eligibility clause. It is also noteworthy that, in eliminating reference to the 14th Amendment in its “quote” from *Hollander*, the *Tisdale* district court dismissal order suggests that the right of “citizenship” which had existed “since the time of the founding” had a source *other* than the 14th Amendment, which did not come into existence until 1868, nearly a full century after the “founding.”

That source would have included the congressional “naturalization” law enactments of 1790 (1 Stat. 103) and 1795 (1 Stat. 414) and which enactments, it must be remembered, were plainly misinterpreted and misapplied by Justice Horace Gray, author of the *Wong Kim Ark* opinion, as discussed and analyzed [here](#).

In this regard, remember that *Schneider* holds that while a “naturalized” citizen is in all respects entitled to U.S. “citizenship,” he/she is ineligible to serve as president because he/she is not a “natural born Citizen” as required by the Constitution. The 14th Amendment does not alter this fact, as discussed [here](#) and [here](#).

While § 212 of Emmerich de Vattel’s treatise, *The Law of Nations*, identifies who is, and who is not a “natural born Citizen” – a definition seemingly clearly ratified by the Supreme Court in *Minor v. Happersett*, 88 U.S. 162, 167-168 (1875), *abrogated by the 19th Amendment* (1920) – there is no such thing as “natural born citizenship.” Recall once again that all natural born Citizens are also native born citizens, but not all native born citizens are natural born Citizens, and that the natural born Citizen *alone* is eligible to the presidency.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides† that “no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,”‡ and that Congress shall have power “to establish a uniform rule of naturalization.” Thus new citizens may be born or they may be created by naturalization.

The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their

* Articles of Confederation, § 3, 1 Stat. at Large, 4.

† Article 2, § 1.

‡ Article 1, § 8.

Source: [U.S. Reports: Minor v. Happersett, 88 U.S. \(21 Wall.\) 162 \(1875\). \(loc.gov\)](#)

A person merely born here – regardless of parental nationalities and except for foreign diplomatic personnel and hostile occupying forces – enjoys U.S. “citizenship” as a “citizen.” This is the exclusive holding of the *Wong Kim Ark* case. All other discussions of “natural born citizens” therein “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. Even the court in *Hollander* cited Charles Gordon’s work in reaching its conclusions. While “dictum” in a case may be interesting, it is neither “holding” nor “precedent,” and those who contend that *Tisdale* or *Wong Kim Ark* “settle” the eligibility question are, respectfully, wrong. Just as there is no such thing as “natural born citizenship,” there is no such thing as “precedential dictum.”

Stated otherwise, the *Schneider* holding establishes that, regardless of parental citizenship, one merely born here does *not* thereby accede either to status as a “natural born Citizen” or to a condition of “natural born citizenship.” That term is in itself a CRS-favored neologism, as discussed [here](#). Indeed, while the terms “citizen” and “citizens” appear in both the Constitution and the 14th Amendment, nowhere in either of those documents does the term “citizenship” appear.

Therefore, why the district court in *Hollander* chose to characterize the Supreme Court’s “we start from the premise” language in *Schneider* as “dicta” remains to be seen. When a U.S. Supreme Court opinion begins by articulating an undisputed, bedrock principle upon which the balance of the opinion rests, a pretty good argument can be made that the statement is not dictum.

That anomaly aside, when the *Tisdale* district court judge changed the actual “comma” to a “period” and thereafter omitted the *Schneider* language above supplied from the original *Hollander* quote, the district court order frustrated a complete analysis of what both the *Hollander* and *Schneider* decisions mean. Inadvertent? Perhaps.

Third, and as the final “nail in the coffin” of the purported “precedential” or “controlling” import of the *Tisdale* rulings – the Fourth Circuit’s “not binding precedent” caveat aside – both of the *Tisdale* rulings rely upon *Hollander* for the claim that it settles the presidential eligibility issue. Sorry, Wilson; sorry, Luke: wrong.

In fact, as stated in the opinion itself, 566 F. Supp. 2d at 65 (forgive the lengthy quote): “Fred Hollander, proceeding pro se, brings this action challenging Senator John McCain’s eligibility to serve as President of the United States. Hollander claims that McCain, by virtue of his birth in the Panama Canal Zone—albeit to American parents—is not a “natural born Citizen” eligible to hold the office of President under Article II, § 1 of the Constitution. Though McCain and his co-defendant, the Republican National Committee (“RNC”), vigorously dispute this claim, they argue that this court cannot decide it in any event due to a number of jurisdictional defects: *lack of standing* and ripeness, mootness, and nonjusticiability. The defendants also argue that Hollander has failed to state a claim for relief because (1) they are not state actors, so Hollander cannot maintain any constitutional claim against them and (2) in any event, any remedy for it would necessarily violate their own First Amendment rights.” (Emphasis added)

THE PARTIES

4. Plaintiff Fred Hollander is a citizen of the State of New Hampshire who resides in Nashua, Hillsborough County, New Hampshire. He is a registered voter with Republican Party and plans to vote in the 2008 national election for the Office of President.

5. Defendant Senator John McCain, 241 Russell Senate Office Building, Washington, D.C. 20510, is the presumptive nominee of the Republican Party. As a person born outside the United States, McCain is not a natural born citizen as required to be eligible to the Office of President under the terms of Article 2, Section 1 of the United States Constitution. McCain campaigned in the State of New Hampshire and participated in the Republican primary in New Hampshire which helped him to win the Republican nomination for the Office of President.

6. Defendant Republican National Committee, 310 First Street, Washington, D.C. 20003, is the organization that will, by its own party rules, nominate Senator John McCain as the Republican Party candidate for the Office of President in the 2008 national election. The RNC held its first primary for the presidential nomination in the State of New Hampshire.

Source: [mccain_hollander_041708.pdf \(washingtonpost.com\)](#)

The court then stated, and with particular relevance to the Wilson and Luke comments that *Tisdale*, relying on *Hollander*, constitutes federal “authority” supposedly “settling” the issue: “This court held a hearing on the defendants’ motion to dismiss this action on

those grounds [*i.e.*, standing, ripeness, mootness, etc.] on July 24, 2008. Based on the arguments presented there, as well as in the parties' briefing, *the court rules that Hollander lacks standing to bring this action. The court does not reach the rest of the parties' arguments, including, most notably, the question of McCain's constitutional eligibility to be President.* (Emphasis added)

There is another word to describe the pontifications in *Hollander*, repeated and adopted in *Tisdale*, regarding the issue of presidential (and vice-presidential) eligibility under the Constitution: dicta, pure and simple.

Accordingly, for Wilson, Luke and all others smitten by the stellar intellect and reasoning in the *Tisdale* and *Hollander* rulings: nice try..., no cigar.