The Toomey Constituent Letter

"LEGALLY UNSUPPORTABLE"

by Joseph DeMaio, ©2020

Rep. John Bingham is considered the "father" of the 14th Amendment, which was written to give the children of former slaves U.S. citizenship

(Oct. 22, 2020) — With apologies for the length of this post – the issues are sometimes convoluted, – Senator Pat Toomey (R. PA) recently penned a letter to a constituent opining that, under his reading of the 14th Amendment, he "[did] not believe there are any questions regarding Senator [Kamala Devi] Harris's ("KDH") eligibility to serve as vice president." Sen. Toomey also tells his constituent – one Jeffrey Harrison, a Marine veteran – to "not hesitate to contact [Sen. Toomey] in the future if [Toomey] may be of assistance." More on that later. Your faithful servant offers the following observations in response to the Toomey letter.

First, because Sen. Toomey has announced that he will be retiring from the Senate when his term ends in 2022 and not running for Pennsylvania governor, he has, as they say, little to lose in taking a position – even an erroneous one – on the constitutional bona fides of Kamala Devi Harris. But as Vice-President Pence reminded Senator Harris in their debate, while someone is entitled to his own opinion, he is not entitled to his own facts. The same can be said of Sen. Toomey's letter.

Second, Sen. Toomey apparently bases his conclusion that KDH is eligible to be Vice-President on the wording of the 14th Amendment. The 12th Amendment is mentioned, but disregarded, in his letter. Specifically – but erroneously – he asserts that the 14th Amendment "is clear" that "U.S. citizenship is a birthright for all born on U.S. soil."

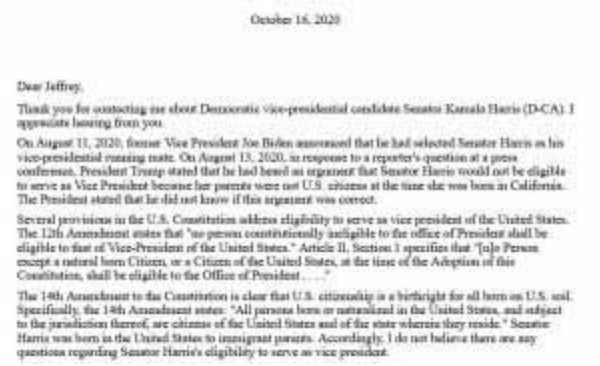
That casual claim is manifestly wrong on its face, as there are clear exceptions for foreign diplomatic personnel and hostile occupying forces.

But Toomey then clarifies his words: "Specifically, the 14th Amendment states: '[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Since foreign diplomatic personnel and hostile occupying forces are not "subject to the jurisdiction" of the United States, they would in any event not be considered or deemed to be "citizens of the United States."

However, the 14th Amendment says "born or naturalized…." Plainly, if one has been naturalized (a mechanism for bestowing citizenship on foreigners *other* than by birth in the nation), the person is by definition "subject to the jurisdiction" of the United States. There are two – and only two – ways of becoming an American *citizen*: (1) birth, subject to certain qualifications, on U.S. soil; or (2) naturalization. There is one – and only one – way of becoming an American "*natural born Citizen*": birth on U.S. soil to a mother and father who are, at the time of the birth, already either native-born (which includes those who are also natural-born) or naturalized U.S. citizens, as originally intended by the Founders. It is that simple.

Accordingly, as such, the 14th Amendment is a "naturalization" law and not one bestowing "natural born citizen" status upon anyone. In *Schneider v. Rusk*, 377 U.S. 163 (1964), the Supreme Court, with Justice Douglas opining for the majority, held, 377 U.S. at 165: "We start 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*[, Cl. 5]." (Emphasis added). Naturalized persons are ineligible to either the presidency or the vice-presidency, which is why Arnold Schwarzenegger will never command the Oval Office.

Recalling that all natural-born citizens are also native-born citizens, but not all native-born citizens are natural-born citizens, Justice Douglas's recognition of a "difference" between a "native born" citizen and a "naturalized" citizen with regard to the presidency destroys the argument that the terms "native-born citizen" and "natural-born citizen" are synonymous and interchangeable. They are not, because there is a "difference drawn by the Constitution between the two." Again, it is that simple.



October 16, 2020

Dear Jeffrey,

Thank you for contacting me about Democratic vice-presidential candidate Senator Kamala Harris (D-CA). I appreciate hearing from you.

On August 11, 2020, former Vice President Joe Biden announced that he had selected Senator Harris as his vice-presidential running mate. On August 13, 2020, in response to a reporter's question at a press conference, President Trump stated that he had heard an argument that Senator Harris would not be eligible to serve as Vice President because her parents were not U.S. citizens at the time she was born in California. The President stated that he did not know if this argument was correct.

Several provisions in the U.S. Constitution address eligibility to serve as vice president of the United States. The 12th Amendment states that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." Article II, Section 1 specifies that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."

The 14th Amendment to the Constitution is clear that U.S. citizenship is a birthright for all born on U.S. soil. Specifically, the 14th Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Senator Harris was born in the United States to immigrant parents. Accordingly, I do not believe there are any questions regarding Senator Harris's eligibility to serve as vice president.

But after quoting the language of the amendment, Toomey's letter falls into the same conceptual punji trap intentionally set and marketed by those who claim that so-called "birthright citizenship" under the 14th Amendment trumps all contrary theories. So goes the trap argument, the 14th Amendment, coupled with the majority opinion in the U.S. Supreme Court decision in *United States v. Wong Kim Ark* ("*WKA*") supports the conclusion that if one is merely born in the United States to parents otherwise "subject to the jurisdiction" of the nation, that person is, *ipso facto*, a "natural born Citizen" for presidential (and as to KDH, vice-presidential) purposes. Sen. Toomey's letter does not reference *WKA,* but its reasoning and conclusion mirrors the dictum of *WKA.*

As discussed here, here and here, that conclusion is a legally unsupportable and, until the Supreme Court holds otherwise, likely a colossal and erroneous "leap of faith."

Indeed, all of the references in *WKA* to a "natural born citizen" and later cases parroting that line of thought – the term "natural born citizen" appearing nowhere in the 14th Amendment, which was the *only* provision under consideration in *WKA* – constitute irrelevant "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, and on occasion even decorative, it is neither "holding" nor "precedent" and those who contend that *WKA* "settles" the eligibility question are, respectfully, wrong. There is no such thing as "precedential dictum."

In this regard, the recent so-called "Newsweek Eastman Article" drew into question the KDH eligibility issue under the 12th Amendment, which requires a Vice-President to possess the same eligibility *bona fides* as a president. The article posits that KDH may not satisfy the "natural born citizen" criteria because, her citizenship status at birth – derivative from her Indian mother and her Jamaican father – fails since her parents were apparently here on student visas, rather than here as lawful resident aliens. Thus, since her parents were not "subject to the complete jurisdiction" of the United States, neither

was KDH upon her birth. That assumes, however, that the 14th Amendment has any relevance to KDH's constitutional *bona fides.* It does not.

Problematically, the Eastman article also claims, however, that if KDH's parents were here as lawful permanent resident aliens instead of temporary students, "then under the actual holding of *Wong Kim Ark*, she should be deemed a citizen at birth—that is, a natural-born citizen—*and hence eligible.*" (Emphasis added). With respect, Professor Eastman is incorrect: the "actual holding" in *WKA* has nothing *at all* to do with the issue of who is – and who is *not* – a "natural born Citizen" for presidential eligibility purposes. While a "citizen at birth" is concededly a "citizen," that person is not necessarily a "natural-born Citizen" for Eligibility Clause purposes. Yet again, it is that simple.

To reiterate that which was discussed here, the author of the 14th Amendment, John Bingham, intended that the 14th Amendment would bestow citizenship via naturalization upon an entire class of people – freed American slaves – to make them "citizens" of the United States.

He well-understood that the individuals affected by his amendment would become "citizens," but not "natural born Citizens" as contemplated under Art. 2, § 1, Cl. 5 of the Constitution. He well-understood that the Founders differentiated between a "citizen" and "natural born Citizen" from the language of the Eligibility Clause itself, creating a "grandfather exception" in the clause in recognition that, at the time the Constitution was created, there were no "natural born Citizens" eligible to the presidency.

Indeed, in the years preceding the passage and enactment of the 14th Amendment, Bingham 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, and accordingly, that an amendment would be needed.

RECONSTRUCTION.

RATIFICATION OF THE FOURTEENTH AMENDMENT.

WASHINGTON, July 19.—The President publishes the following, officially announcing the ratification by South Carolina and Louisiana of the Fourteenth amendment to the Constitution of the United States:

By the President of the United States of America.

A PROCLAMATION.

Whereas, By an act of Congress entitled "An act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to representation in Congress," passed the 25th day of June, 1868, it is declared that it is made the duty of the President, within ten days after receiving official information of the ratification by the Legislature of either of said States of a proposed amendment to the Constitution, known as article 14, to issue a proclamation announcing that fact; and,

Whereas, On the 18th day of July, 1868, a letter was received by the President, which letter being addressed to the President, bears date of July 15, 1868, and was transmitted by and under the name of R. K. Scott, who therein writes himself Governor of South Carolina, in which letter was inclosed and received at the same time by the President a paper purporting to be a resolution of the Senate and House of Representatives of the General Assembly of the State of South Carolina, ratifying the said proposed amendment, and also purporting to have passed the two said Houses respectively, on the 9th and 9th of July, 1868, and to have been approved by the said R. K. Scott, as Governor of said State, on the 15th of July, 1868, which circumstances are attested by the signatures of D. T. Corbin, as President *pro tempore* of the Senate, and of F. J. Moses, jr., as Speaker of the House of Representatives of said State, and of the said R. K. Scott, as Governor.

Now, therefore, be it known, That I, Andrew Johnson, President of the United States of America, in compliance with and in execution of the Act of Congress aforesaid, do issue this, my proclamation, announcing the fact of the ratification of the said amendment by the Legislature of the State of South Carolina in the manner hereinbefore set forth.

In testimony whereof I have signed these presents with my hand, and have caused the seal of the United States to be hereto affixed.

Done at the City of Washington, this 19th day of July, in the year of our

Screenshot from a column (far right) published in the July 20, 1868 New York Tribune (courtesy Library of Congress)

This sage recognition, of course, is diametrically opposed by contemporary "close-enough-for-government-work" eligibility fabricators. Those folks contend that no amendment of the Eligibility Clause – other than outright repeal – is needed when all that is required is for the Congressional Research Service ("CRS") and a couple of former Solicitors General to opine that "birthright citizenship" under the 14th Amendment is "good enough" to render one a "natural born Citizen" for presidential and vice-presidential eligibility purposes.

Stated otherwise, the "*ipse dixit*" – "it is so because I say it is so" – pontifications of the CRS and Messrs. Clement and Katyal are claimed to suffice to dispense with the need for a constitutional amendment or a binding opinion of the Supreme Court. Respectfully, unless and until the Supreme Court declares otherwise, those pontifications are wrong.

Returning to Bingham's views regarding the 14th Amendment, on April 11, 1862, when the 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). Faithful P&E readers, take note: 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 referring to the term the Founders had included as the Eligibility Clause restricting the presidency exclusively to a "natural-born Citizen."

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. 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 "not owing allegiance to any foreign sovereignty."

The import and significance of Bingham's words – as opposed to the ruminations of the CRS and former Solicitors General – 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.

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.")

Kamala Devi Harris from her Senate website

Accordingly, Senator Toomey's letter provides no support for the proposition that a "citizen" who may be the product of naturalization via the 14th Amendment is the equivalent of a "natural born Citizen" for eligibility purposes. Thus, his conclusion that Kamala Devi Harris is eligible to serve as Vice-President is, respectfully, in error.

Finally, as a third (and, mercifully, last) point of this post, the recipient of the Toomey letter, Jeffrey Harrison, may wish to take Sen. Toomey up on his offer to contact him in the event that he needed additional assistance. The additional assistance needed: a request that Sen. Toomey read your humble servant's post – including the embedded links – and respond to Mr. Harrison with an explanation of why, in the Senator's view, KDH remains eligible to serve as Vice-President, and hopefully, without *ipse dixit* reasoning.

Just sayin'….