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MEMORANDUM

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.

Concerning the production or release of an original birth certificate, it should be noted that there is no federal law, regulation, rule, guideline, or requirement that a candidate for federal office produce his or her original birth certificate, or a certified copy of the record of live birth, to any official of the United States Government; nor is there a requirement for federal candidates to publicly release such personal record or documentation.² Furthermore, there is no specific federal agency or office that "vets" candidates for federal office as to qualifications or eligibility prior to election.³

The mechanics of elections of federal officials within the several states are administered under state law.⁴ The quadrennial presidential election, although required since 1845 to be held on the same day in each

¹ The standing qualifications to be President of the United States, at Article II, Section 1, clause 5, of the Constitution provide that one must be at least 35 years old, a resident "within the United States" for 14 years, and a "natural born Citizen."

² In addition to the "natural born Citizen" requirement for President, a United States Senator must be a "citizen" of the United States for nine years (Art. I, Sec. 3, cl. 3), and a United States Representative must be a "citizen" for seven years (Art. I, Sec. 2, cl. 2). No general requirement exists for candidates to the United States Senate or House of Representatives to produce an original, or a certified copy of a birth certificate.

³ The Federal Election Commission is authorized by law to administer and seek compliance with the *campaign finance* provisions of federal law for candidates to federal office, and to administer and seek compliance with the provisions for public financing of the nomination and election of candidates for President, but has no duties or responsibilities with respect to judging or vetting qualifications or eligibility of candidates to federal office. 2 U.S.C. § 437c.

⁴ Article II, Section 1, cl. 2, delegates authority to the state legislatures to direct the manner of appointment of electors for President; and Article I, Section 4, cl. 1, delegates to the state legislatures the initial authority for the "Times, Places and Manner" of elections to Congress, with a residual authority in Congress to make such regulations.

state⁵ is, in an administrative and operational sense, fifty-one separate elections in the states and the District of Columbia for presidential electors. States generally control, within the applicable constitutional parameters, the administrative issues, questions, and mechanisms of ballot placement and ballot access.⁶

State election officials under some state ballot laws might thus require candidate “statements” or “declarations” of candidacy attesting to and/or certifying certain facts as a condition to be on the ballot; in other states, representatives of the established political parties may certify names to the Secretary of State, or the designated elections official may place viable or “recognized” candidates on the presidential preference ballots.⁷ In such cases, opposing political candidates or political parties may have “standing” to legally challenge the placement of a name of an opponent on the ballot,⁸ or state law may specifically provide for a procedure for timely protests to be filed concerning the qualifications of candidates.⁹ Additionally, the relevant election official in the state, such as the Secretary of State, may have authority to exercise *discretion* to challenge a self-certification or a certification by a political party of a candidate whom the election official believes is not eligible for the office. It would appear to be a matter of state law and interpretation as to whether election officials in a particular state have discretionary authority to question the certification of a party’s nominated candidate, or even a self-certification of a candidate, if such election officials were presented with actual probative, documentary evidence to rebut any presumed or self-certified eligibility. In *Keyes v. Bowen*, the California Supreme Court dismissed a suit against the Secretary of State which challenged President Obama’s eligibility and the California electoral votes for him, finding that: “Petitioners have not identified any authority *requiring* the Secretary of State to make an inquiry into or demand detailed proof of citizenship from Presidential candidates,” and thus mandamus (a writ of mandate) was not granted.¹⁰ However, although no “ministerial duty” or mandatory requirement exists to support a mandamus action, there may still exist *discretionary* authority in such elections official.¹¹

Several citizen law suits filed in 2008 challenging the eligibility of one or both of the major party candidates for President were dismissed because of the lack of legal “standing” of the plaintiff. Article III, Section 2, of the Constitution provides that jurisdiction of the federal courts extends only to “cases” and “controversies,” and this jurisdictional limitation is interpreted to mean that the litigant bringing a case must have an actual *injury* which is real or concrete, as opposed to theoretical or hypothetical, and which is also discrete or particularized to that individual or group, rather than overly generalized.¹² The

⁵ 5 Stat. 721, Ch. 1, January 23, 1845; see now 3 U.S.C. § 1.

⁶ *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Lubin v. Panish*, 415 U.S. 709, 719 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

⁷ See, e.g., Senate Rules and Administration Committee, *Nomination and Election of the President and Vice President of the United States*, 2000, S. Doc. 106-16 (January 2000).

⁸ *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 585-588 (5th Cir. 2006), *Application for Stay to Supreme Court, denied*, No. 06-A-139 (2006), regarding ballot placement of a “substitute” *opposition* candidate under state law, and the constitutional “eligibility” of the original candidate; see also *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), finding standing of opposition party to challenge ballot placement of opposing candidates; *Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994) (discussion of “competitors’ standing” in a political context).

⁹ Note, e.g., Ohio Revised Code, § 3513.05 (formerly Ohio Gen. Code § 4785-70), and *McGowan v. Board of Elections*, 105 N.E.2d 639 (Ohio 1952), appeal of voter protest of citizenship qualification in statement of candidacy of a federal candidate.

¹⁰ *Keyes v. Bowen*, Case No. 34-2008-80000096-CU-WM-GDS, Slip op. at 2 (Sup. Ct. Cal. March 13, 2009). Emphasis added.

¹¹ See, for example, unreported case of *Cleaver v. Jordan*, Case no. 7838 (Calif. Supreme Court minutes, Sep. 26, 1968), *cert. denied*, 393 U.S. 810 (1968), where California court reportedly upheld discretionary authority of Secretary of State not to list ineligible candidate for President on the ballot; and *Jenness v. Brown*, also unreported, case no. civil 72-204 (S.D. Ohio Sep. 27, 1972), concerning ballot placement of an ineligible candidate in Ohio.

¹² *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83 (1968); *Valley Forge Christian College v. Americans United* (continued...)

constitutional principles underlying this “standing” requirement - a component of the doctrine of separation of powers - reflect the limited role of the judiciary expressed in the Constitution and recognize the deference to the democratically elected “political” or “representative” branches of the federal government with regard to addressing generalized interests and questions of public policy and constitutional precepts (as opposed to addressing particularized injuries resulting from constitutional violations).¹³ The general, societal interests claimed by certain individuals, where there are no cognizable particularized injuries, are deemed intended to be addressed by the political process and by the “political” departments of government, rather than in the context of the more limited role assigned to federal courts. Thus, in both a practical and constitutional sense, the general, overall “vetting” of political candidates in the United States is considered a consequence and product of the political process, and within the bailiwick of the political institutions and political branches of government. As noted by the Supreme Court with respect to another provision in the Constitution, which was found not to be the proper subject of general citizen suits:

In a very real sense, the absence of a particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.¹⁴

With respect to presidential candidates, this political process includes running the gauntlet of numerous political party primaries, caucuses, or conventions in the states; being the subject of intense “opposition research” by political opponents in one’s own party in the nomination process, and by the opposition party in the general election campaign; scrutiny in the primaries and the general election by an independent press; and the necessity of convincing the majority of voters in enough states of one’s abilities as well as qualifications.¹⁵ For candidates of major political parties, there is an inherent self-interest of the party to thoroughly “vet” a candidate to whom it is considering giving its nomination so that the party will not waste opportunity and time, and deplete its resources, on a candidate who is not eligible for the office.

Finally, concerning official oversight of “eligibility,” it may be noted that the issue of qualifications of elected federal officials might be considered to have been delegated, at least in part, to one of the political branches of government, that is, the United States Congress. With respect to the qualifications for Congress, for example, each house of Congress is expressly granted within the Constitution the specific authority to “be the Judge of the Elections, Returns and Qualifications of its own Members.”¹⁶ This authority has been described by the Supreme Court as “an unconditional and final judgment” over the seating of its own Members,¹⁷ which is not reviewable by the courts because it is “a non-justiciable

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for *Separation of Church and State*, 454 U.S. 464 (1982); *Allen v. Wright*, 468 U.S. 737 (1984).

¹³ See, e.g., discussions in Devins and Whittington (editors), *Congress and the Constitution*, (Duke University Press 2005).

¹⁴ *United States v. Richardson*, 418 U.S. 166, 179 (1974) (denying standing to citizens under the Constitution’s “Accounts Clause” (Art. I, § 9, cl. 7)), quoted in *Berg v. Obama*, 574 F.Supp.2d 509, 520, n.13 (E.D. Pa. 2008), *stay app. denied, petition for review denied*, 555 U.S. ____ (Supreme Court docket no. 08-570, December 9 and 17, 2008), denying “standing” to a voter or citizen who has no particularized, differentiated claim, nor any concrete or actual “injury,” concerning the qualifications clause.

¹⁵ As noted by a federal judge in summarily dismissing a citizen suit concerning President Obama’s “natural born” citizenship (and ordering the attorney who was a member of that bar to show cause why he should not be disciplined for filing a frivolous and harassing lawsuit): “The issue of the president’s citizenship was raised, vetted, blogged, texted, twittered, and otherwise massaged by America’s vigilant citizenry during Mr. Obama’s two-year-campaign for the presidency, but this plaintiff wants it resolved by a court,” *Hollister v. Soetoro*, Civil Action No. 08-2254, Slip. Op. at 1- 2 (D.D.C. March 5, 2009).

¹⁶ Article I, Section 5, clause 1.

¹⁷ *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972). See also *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929).

political question.”¹⁸ As to presidential candidates, the United States Congress, in joint session, is specifically directed in the Constitution to count the electoral votes and to formally announce the winner of the presidential election.¹⁹ It has generally been assumed over the more than 220 years of presidential elections that the specific authority to “count” the electoral votes must, by practical necessity, also involve the implied authority to determine which electoral votes to count. Congress has thus developed over time a detailed process whereby electoral votes may be “challenged” in the joint session, and the procedures for resolving such challenges.²⁰ It may be noted that even prior to Congress codifying in law the procedures for challenging electoral votes, Congress had rejected three electoral votes which were given by electors in the State of Georgia for a candidate who had died, and thus obviously was no longer eligible to serve as President.²¹ It appears from the record that no Member of the House or of the Senate of the 111th Congress, in joint session for the purpose of counting and certifying the electoral vote, raised or forwarded any objection to the electoral votes of (then) President-elect Obama on the grounds of qualifications, or otherwise.²²

Legal Analysis of Natural Born Citizenship Requirement

Background/Summary

Because the term “natural born Citizen” is not defined within the Constitution, nor has the Supreme Court ever needed to rule specifically on the terms in this clause, there have been questions raised from time-to-time as to the precise meaning of the qualifications clause.

As explained by the Supreme Court of the United States over the course of a number of years, it is well-settled from common law principles of *jus soli* (“law of the soil”) extant in England and the Colonies at the time of Independence,²³ as well as from subsequent constitutional provisions, as well as subsequent statutory law, that *all* persons born “in” the United States and subject to its jurisdiction are citizens of the United States “at birth.”²⁴ As such, any person physically born “in” the United States, regardless of the citizenship of one’s parents (unless such parents are foreign *diplomatic* personnel *not* subject to the jurisdiction of the United States), would appear to be a “natural born” citizen eligible to be President of the United States.²⁵

¹⁸ *Roudebush, supra* at 19. See *Powell v. McCormack*, 395 U.S. 486 (1969) for parameters of the “qualifications” which may be judged. See Court of Appeals opinion authored by then-judge Scalia in *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986).

¹⁹ U.S. Constitution, Amendment 12, amending Article II, Section 1, clause 3.

²⁰ Electoral Count Act of 1887, 24 Stat. 373, ch. 90, 49th Cong., February 3, 1887; 62 Stat. 671, P.L. 771, June 25, 1948, enacting Title 3, United States Code, into positive law. See now 3 U.S.C. §§ 3-21. See generally CRS Report RL32717, Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress, by Jack Maskell and Elizabeth Rybicki.

²¹ *Congressional Globe*, 42nd Cong., 3rd Sess. 1285-1287, 1289 (February 12, 1873). See CRS Report RL30769, Electoral Vote Counts in Congress: Survey of Certain Congressional Practices, by Jack Maskell et al., at 14-15.

²² 155 *Congressional Record* H75-76 (daily ed., January 8, 2009).

²³ “The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.” *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *Moore v. United States*, 91 U.S. 270, 274 (1875); *United States v. Wong Kim Ark*, 169 U.S. 649, 654-655 (1897).

²⁴ *United States v. Wong Kim Ark*, 169 U.S. 649 (1897); *Weedin v. Chin Bow*, 274 U.S. 657 (1926); *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Perkins v. Elg*, 307 U.S. 325, 329-330, 334 (1939). See now 8 U.S.C. § 1401(a); United States Constitution, Amendment 14, Section 1.

²⁵ See specifically *Perkins v. Elg, supra* at 329-330, where the Supreme Court explains that “a child born here of alien parentage (continued...)”

Most of the serious academic and scholarly inquiry on the presidential qualifications clause has been directed at the question of whether one who is a United States citizen “at birth” because of the operation of federal statutory *law* is also a “natural born” citizen, regardless of whether that person is physically born “in” the United States. Such questions often concern persons born abroad to parents who are United States citizens, or persons born abroad when only one parent is a United States citizen who had resided in the United States.²⁶ Although such individuals may clearly be United States citizens “at birth” by statute, would such persons also be “natural born Citizens,” or should such persons be considered “naturalized” (albeit automatically by statute at birth)?²⁷

The weight of scholarly legal and historical opinion appears to support the notion that “natural born Citizen” means one who is entitled under the Constitution or laws of the United States to U.S. citizenship “at birth” or “by birth,” including any child born “in” the United States (other than to foreign diplomats serving their country), the children of United States citizens born abroad, and those born abroad of one citizen parent who has met U.S. residency requirements.²⁸ The *Constitution of the United States of America, Analysis and Interpretation*, prepared for the United States Senate by this agency, agrees with the majority of scholarship on the issue, noting that “[w]hatever the term ‘natural born’ means, it no doubt does not include a person who is ‘naturalized,’” that is, one who must go through the legal process of naturalization and, after discussing historical and legal precedents and arguments, concludes that “[t]here is reason to believe ... that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of American citizens.”²⁹

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becomes a citizen of the United States,” even if she or he is removed to a foreign country by a parent and made a citizen there. The Court favorably cites a decision of the Attorney General that such a person is “a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States ... [even though] the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance and has acquired for himself and his son German citizenship and the rights which it carries”

²⁶ See now 8 U.S.C. § 1401(c) – (g), setting out the several categories of persons born outside of the limits of the United States who are deemed to be United States citizens “at birth.”

²⁷ Arguments have been raised that, under the 14th Amendment, one is now a citizen of the United States if one is either “born or naturalized in the United States,” and that such two methods of citizenship are exclusive. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. *supra* at 702-703; *Rogers v. Bellei*, 401 U.S. 815, 841 (1971), J. Black dissenting: “All means of obtaining American citizenship which are dependant on congressional enactment are forms of naturalization.”

²⁸ *Robinson v. Bowen*, 567 F.Supp.2d 1144, 1145-1146 (N.D. Cal. 2008); Jill Pryor, “The Natural Born Citizen Clause and Presidential Eligibility: An Approach to Resolving Two Hundred Years of Uncertainty,” 97 *Yale L.J.* 881 (1988); Charles Gordon, “Who Can Be President of the United States: The Unresolved Enigma,” 28 *Md. L. Rev.* 1 (1968); Michael Nelson, “Constitutional Qualifications for President,” *Presidential Studies Quarterly*, Vol. XVII, Number 2, at 384-391 (Spring 1987); Warren Freedman, Comment, “Presidential Timber: Foreign Born Children of American Parents,” 35 *Cornell L.Q.* 357 (1950); Alexander Porter Morse, “Natural Born Citizen of the United States – Eligibility for the Office of President,” 66 *Albany L.J.* 99 (1904); Akil Amar, “Natural Born Killjoy, Why the Constitution Won’t Let Immigrants Run for President, and Why That Should Change,” *Legal Affairs*, 16, 17 (Mar-Apr. 2004): “... the presidency and vice presidency were reserved for citizens by birth.” For the opposing view, see Isidor Blum, “Is Gov. George Romney Eligible to Be President?,” *N.Y.L.J.*, Oct. 16 & 17, 1967, at 1. In a more restrictive analyses one author would include children of U.S. citizens who are born abroad when one or both of the parents are abroad under the direction of and officially representing, or on duty for, the United States Government, either in the military or in a civilian governmental role. Lohman, Christina. “Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause,” 36 *Gonzaga Law Review* 349, 369 (2000/2001).

²⁹ *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. 108-17, 108th Cong., 2d Sess. at 456-457 (2004). The United States Senate has also stated its opinion by way of unanimous consent, in S. Res. 511, 110th Congress, that “natural born citizens” include those persons who are citizens “at birth” by statute by virtue of being born abroad of United States citizens.

Constitutional History

The Constitution does not define the term “natural born Citizen,” nor are the notes from the debates at the Constitutional Convention of 1787 instructive as to any collective intent of the Framers concerning the meaning of the term. Tracing the development of this clause through the Constitutional Convention of 1787 clearly indicates that there were no specific discussions or other explications within the Convention on the meaning of the specific term “natural born” citizen.³⁰

Although there was no discussion concerning the precise meaning or derivation of the term “natural born,” there is in the Documentary History of the Convention a clue from where the qualification for President to be a “natural born” citizen may have derived. The history of the Convention indicates that George Washington, the presiding officer, received a letter dated July 25, 1787, from John Jay, which appears to raise for the first time the issue of a requirement to be a “natural born” citizen of the United States as a requisite qualification to be President:

Permit me to hint, whether it would not be wise & 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 American Army shall not be given to, nor devolve on, any but a natural born Citizen.³¹

There is no specific indication as to the precise role this letter and its “hint” actually played in the adoption by the Convention of the particular qualification of being a “natural born” citizen. However, no other expressions of this particular term are evident in Convention deliberations prior to the receipt of Jay’s letter, and the September 4 draft of the Constitution reported from the Committee of Eleven to the delegates, at a time shortly after John Jay’s letter had been acknowledged by Washington, contained for the first time such a qualification.³² The timing of Jay’s letter, the acknowledgment of its receipt by Washington on September 2, and the first use of the term in the subsequent report of the Committee of Eleven, on September 4, 1787, may thus indicate more than a mere coincidence. If this were the case, then the concern over “foreigners,” without sufficient allegiance to the United States, serving as President and commander-in-chief, would appear to be the initial and principal motivating concern of the Framers, in a somewhat similar vein as their concerns over congressional citizenship qualifications.³³

Such purpose of the “natural born” citizen qualification was expressed by Justice Joseph Story in his historic treatise on the Constitution in 1833:

It is indispensable, too, that the president should be a natural born citizen of the United States ... [T]he general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing

³⁰ II *The Records of the Federal Convention of 1787* (Max Farrand ed.) 85, 97, 116-117, 121-125, 177-179, 185, 337, 344, 366-367, 376, 473, 493-494, 498, 574, 598 (Yale University Press 1911). According to Madison’s notes: “The (section 2.) ... requiring that the President should be a natural-born Citizen, &c & have been resident for fourteen years, & be thirty five years of age, was agreed to nem: con:” [without dissent] II Farrand, *supra* at 536.

³¹ III Farrand, Appendix A, LXVIII, at 61; *Documentary History of the Constitution*, IV, at 237.

³² A letter from Washington to John Jay on September 2, 1787, references Jay’s “hint” and suggestion to Washington. III Farrand, Appendix A, XCIX, at 76; *Documentary History of the Constitution*, IV, 269.

³³ The provision was not directed at foreign-born statesmen or politicians in the country at the time of the drafting of the Constitution, such as Alexander Hamilton who was born in the Caribbean, since the eligibility clause expressly “grand-fathered” in those who were citizens at the time of the adoption of the Constitution. Hamilton, in any event, supported the idea of limiting the eligibility to be President to a current citizen, or thereafter one who is “born a Citizen of the United States.” III Farrand, *supra* at App. F, p. 629.

for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.³⁴

“Ambitious foreigners” who may be “intriguing for the office” of head of state, which had been the unfortunate experience in Europe, appeared to be a generalized and widespread concern at the time of the drafting of the Constitution, as was the concerns over the possibility of allowing foreign royalty, monarchs, and their wealthy progeny, or other relatives to control the government of the new nation. Max Farrand, in his treatise on the adoption of the Constitution, discussed these concerns and rumors during the Convention of 1787:

During the sessions of the convention, but it would seem especially during the latter part of August, while the subject of the presidency was causing so much disquiet, persistent rumors were current outside that the establishment of a monarchy was under consideration. The common form of the rumor was that the Bishop of Osnaburgh, the second son of George III, was to be invited to become King of the United States.³⁵

Others have noted that rumors were extant concerning colonial statesmen approaching or making inquiries of other foreign royalty about seeking the chief executive’s position of the United States, including rumors involving Prince Henry of Prussia, and the ascension of King George’s second son, Frederick, Duke of York. Presidential scholar Michael Nelson has commented:

The presidency they were creating was, the framers realized, the closest analog in the new constitution to a king, just by being a separate, unitary executive. Even before the convention assembled, von Steuben had disseminated a rumor that Nathaniel Gorham, president of Congress under the Articles of Confederation and a convention delegate from New Hampshire, had approached Prince Henry of Prussia about serving as America’s King. Similar stories involved the ascendancy of King George’s second son, Frederick, Duke of York. During the summer, these rumors gained new currency. The story spread that the convention, whose deliberations were secret, was advancing the plot behind closed doors.³⁶

The apparent purposes of this citizenship clause were thus to assure the requisite fealty and allegiance to the nation from the person to be the chief executive of the United States, and to prevent wealthy foreign citizens, and particularly wealthy foreign royalty and their progeny or other relations, from scheming and buying their way into the Presidency, or creating an American monarchy.

Common Understanding of the Legal Term “Natural Born” in 1700s

It may be a somewhat speculative exercise to attempt to discern the “common understanding” of a group of individuals who may be geographically, professionally, and politically diverse, particularly during a period many years removed from the current time. The fact that no discussion of this particular phrase appears in the notes of the Convention of 1787 just highlights the problems in such speculation. That being said, however, there are indications that there existed what might be called a “common” or “general understanding” of the term “natural born,” as it related to those who were considered “natural born” *subjects* of England, at the time of the adoption of the Constitution. This understanding apparently

³⁴ Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 3, § 1473 (1833).

³⁵ Max Farrand, *The Framing of the Constitution of the United States*, 173 (Yale University Press 1913).

³⁶ Nelson, *Presidential Studies Quarterly*, *supra* at 395. See also Akhil Reed Amar, *America’s Constitution, A Biography*, at 164-165 (Random House 2005).

included both the early, strict common law recognition of “natural born” subjects born on British soil, as well as those born abroad of British subjects who were considered (or recognized) as “natural-born subjects” under the operation of several statutory laws dating from the reign of Edward III in 1350, and reiterated and expanded in various forms by Parliament in 1708 (7 Anne, c.5, §3), 1731 (4 George II, c. 21), and 1773 (13 George III, c. 21). This “state of the law” concerning who was a “natural-born” subject of England under English laws was evidently known to the Framers since, as noted by the Supreme Court: “These statutes applied to the colonies before the War of Independence.”³⁷

The concept of a “natural born” subject in English law at the time of the drafting of the Constitution was explained in the legal treatise on the laws of England that was available and widely known in the Colonies, referred to as “Blackstone,” for its author William Blackstone.³⁸ Blackstone traced the development of the concept of “natural-born” allegiance to the reciprocal duties of protection and allegiance that developed concerning land ownership and use under the feudal system, eventually understood to encompass the reciprocal protection/allegiance of all English subjects with respect to the king.³⁹ Concerning specifically the issue of children born abroad of English subjects, Blackstone explains clearly that such children are then (in 1765) considered under the law of England as “natural born” subjects, and have been considered as such for most purposes since at least the time of Edward III (1350), because of the development of statutory law in England to accommodate developing transportation and increased travel by the citizenry, as well as to “encourage also foreign commerce.” As stated by Blackstone in his 1765 treatise:

[A]ll children, born out of the king’s ligeance, whose fathers were natural-born subjects, are now natural born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain.⁴⁰

The “commonly understood” meaning of the term “natural born” in the United States at the time of the drafting of the Constitution may thus be broader than the early, strict English “common law” meaning of that term.⁴¹ Clearly, the term “natural born” subject in British common law, incorporating as it did the concept of *jus soli* (“law of the soil”), included at least *all* of those born “in” the country and subject to its jurisdiction.⁴² However, as noted by Charles Gordon, former General Counsel of the Immigration and

³⁷ *Weedin v. Chin Bow*, 274 U.S. *supra* at 660. The “common understanding” of words or phrases at the time of the drafting of the Constitution is one facet of a tool of constitutional interpretation generally characterized as “originalism,” that is, an attempt to discern the original, collective meaning or intent of the Framers.

³⁸ “... Blackstone’s Commentaries was widely circulated in the Colonies ...” *Powell v. McCormack*, 395 U.S. 486, 538 (1969). “Sir William Blackstone’s Commentaries on the Laws of England (1765-1769) is the most important legal treatise ever written in the English language. It was the dominant lawbook in England and America in the century after its publication and played a unique role in the development of the fledgling American legal system.” William Blackstone, *Commentaries on the Laws of England*, [hereinafter Blackstone], Volume I, Of the Rights of Persons (1765) (Introduction at iii).

³⁹ *Id.* at 354-357.

⁴⁰ *Id.* at 361: “When I say that an alien is one who is born out of the king’s dominions, or allegiance, this also must be understood with some restrictions. ... [T]he children of the king’s ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also To encourage also foreign commerce, it was enacted by statute 25 Edw. III. ft. 2. that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king ... might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.”

⁴¹ Legal scholars in England were not completely unanimous about the narrowness of English common law during this period, as some had averred that even “common law” included as “natural born” subjects those born abroad of English parents, and/or that the statute of 1350, in the reign of Edward III, was merely a recitation or “declaration” of the common law. See discussion in *United States v. Wong Kim Ark*, 169 U.S. at 669- 670, and *Weedin v. Chin Bow*, 274 U.S. 657, 670 (1926).

⁴² See discussion of British common law, and its “incorporation” into the body of law in the United States. *United States v. Wong* (continued...)

Naturalization Service, whether the “body of English law” in the 1770s was from early common law, from statutory law, or from the common law modified over the years by statutory law, these provisions “were part of the corpus of the English law in existence at the time of the Revolution, which was substantially recognized and adopted by our forefathers.”⁴³ This common usage and popular understanding of the term “natural born” subject (as employed in England and understood in the Colonies), and the term’s apparent evolution and broadening through *statutory law*, has thus led several other legal commentators and historians to conclude: “The constitutional Framers had a broad view of the term ‘natural-born’ and considered all foreign-born children of American citizen parents eligible for the Office of the Presidency”⁴⁴; or, as stated by another: “[T]he delegates meant to apply the evolved, broader common law meaning of the term when they included it in the presidential qualifications clause.”⁴⁵

Considering the history of the constitutional qualifications provision, the common use and meaning of the phrase “natural-born subject” in England and in the Colonies in the 1700s, the clause’s apparent intent, the subsequent action of the first Congress in enacting the naturalization act of 1790 (expressly defining the term “natural born citizen” to include a person born abroad to parents who are United States citizens),⁴⁶ as well as subsequent Supreme Court *dicta*, it appears that the most logical inferences would indicate that the phrase “natural born Citizen” would mean a person who is entitled to U.S. citizenship “at birth” or “by birth.” This meaning would include one entitled to U.S. citizenship “at birth” either by being born “in” the United States (and subject to its jurisdiction, that is, not a child of official diplomatic personnel of another nation),⁴⁷ or by being entitled to U.S. citizenship at birth by statute, such as one born abroad of parents who are United States citizens.⁴⁸ Such interpretation would distinguish this “natural born Citizen” from one who is not a U.S. citizen “at birth,” that is, one who is an “alien” and who is required to go through the legal process of “naturalization” to become a United States citizen.⁴⁹

Legal Challenges Brought In 2008

Senator McCain

During the 2008 presidential campaign between Senators McCain and Obama, several lawsuits were initiated challenging the “natural born citizenship” requirement of Senator McCain who was not born “in”

(...continued)

Kim Ark, 169 U.S. 649 (1897); *Weedin v. Chin Bow*, 274 U.S. 657 (1926).

⁴³ Gordon, 28 *Md. L. Rev.*, *supra* at 18.

⁴⁴ Lohman, 36 *Gonzaga Law Review*, *supra* at 369.

⁴⁵ Nelson, at 396. See also 7 Charles Gordon, Stanley Mailman, & Steven Yale-Loehr, *Immigration Law and Procedure*, § 92.03[1][b] (rev. ed. 2000); Pryor, *supra* at 882; Gordon, *supra* at 5-7.

⁴⁶ Act of March 26, 1790, 1 Stat. 103, 104. The law was later amended, and deleted the phrase “natural born” before citizen, without explanation. However, it is still considered significant that the First Congress, with many Framers part of that Congress and occurring closest in time to the drafting of the Constitution, considered it appropriate to define “natural born” citizenship “at birth” by statute. See discussion in *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *Marsh v. Chambers*, 463 U.S. 783, 788-791 (1983). See also *Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994): “Although the actions of the early congresses are not a perfect indicator of the Framers’ intent, those actions provide some indications of the views held by the Framers, given the propinquity of the congresses and the framing and the presence of a number of Framers in those congresses.”

⁴⁷ See, for example, discussion in *dicta* in *Perkins v. Elg*, 307 U.S. 325, 329-330, 334 (1939). Note 14th Amendment, Section 1.

⁴⁸ As a general matter, depending on the law of a nation, one may be entitled to citizenship “at birth” either through the place of birth (*jus soli*), or through the citizenship of one’s parents, that is, citizenship by descent (*jus sanguinis*).

⁴⁹ *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

the United States, but rather in the Panama Canal Zone in 1936.⁵⁰ Although these suits concerning Senator McCain's eligibility were generally dismissed for want of legal standing of the plaintiff,⁵¹ a federal district court for the Northern District of California did note that Senator McCain would qualify as a citizen "at birth," and thus a "natural born" citizen, since he was born "out of the limits and jurisdiction of the United States" to two United State citizen parents, as provided for in federal nationality statutes in force at the time of his birth.⁵² The court there found that the meaning of the phrase in the nationality statutes in force in 1936 (R.S. § 1993 (1855) and 48 Stat. 797 (1934)), that is, the phrase "born out of the limits and jurisdiction of the United States" to citizen parents, was merely the reverse or "converse of the phrase 'in the United States, and subject to the jurisdiction thereof'" appearing in the citizenship provision of the 14th Amendment, and that such phrase thus would include all those born abroad of two United States citizen parents, such as Senator McCain:

Article II states that "No Person except a natural born Citizen, or a Citizen at the time of the Adoption of this Constitution, shall be eligible to the Office of the President." Article II left to Congress the role of defining citizenship, including citizenship by reason of birth. *Rogers v. Bellei*, 401 U.S. 815, 828, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971). Many decades later, the Fourteenth Amendment set a floor on citizenship, overruled the *Dred Scott* decision, and provided that all born or naturalized in the United States, and subject to the jurisdiction thereof, were citizens by reason of birth (or naturalization proceedings, for that matter). *Id.* at 829-30, 91 S.Ct. 1060.

At the time of Senator's McCain's birth, the pertinent citizenship provision prescribed that "[a]ny child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States." Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797. The Supreme Court has interpreted the phrase "out of the limits and jurisdiction of the United States" in this statute to be the converse of the phrase "in the United States, and subject to the jurisdiction thereof," in the Fourteenth Amendment, and therefore to encompass all those not granted citizenship directly by the Fourteenth Amendment. [*United States v. Wong Kim Ark*, 169 U.S. 649, 687 (1898)] Under this view, Senator McCain was a citizen at birth. In 1937, to remove any doubt as to persons in Senator McCain's circumstances in the Canal Zone, Congress enacted 8 U.S.C. 1403(a), which declared that persons in Senator McCain's circumstances are citizens by virtue of their birth, thereby retroactively rendering Senator McCain a natural born citizen, if he was not one already. This order finds it highly probable, for the purposes of this motion for provisional relief, that Senator McCain is a natural born citizen. Plaintiff has not demonstrated the likelihood of success on the merits necessary to warrant the drastic remedy he seeks.⁵³

The court thus implicitly adopted a meaning of the term "natural born Citizen" in the presidential eligibility clause which would include not only the narrow "common law" (based on apparent British common law) and the later United States constitutional designation for 14th Amendment purposes, that is, one born "in" the United States (*jus soli*), but also the *statutory* designation by Congress of one entitled to U.S. citizenship "at birth" or "by birth" transmitted from one's parent or parents (*jus sanguinis*).

⁵⁰ See so-called "Insular cases" where the Supreme Court, in another context, found that the phrase "within the United States" means within the geographical limits of the (current 50) states and the District of Columbia, and in those territories under the jurisdiction of the United States only if they have been "incorporated" into the United States. *Downes v. Bidwell*, 182 U.S. 244, 250-251 (1901); *Balzac v. Porto Rico*, 258 U.S. 298, 304-305 (1922).

⁵¹ *Hollander v. McCain*, 566 F. Supp.2d 63 (D.N.H. 2008); *Robinson v. Bowen*, 567 F.Supp.2d 1144 (N.D. Cal. 2008).

⁵² *Robinson v. Bowen*, *supra* at 1146.

⁵³ *Robinson v. Bowen*, *supra* at 1145-1146.

President Obama

In addition to the lawsuits concerning Senator McCain's eligibility, there had been several allegations and lawsuits brought challenging the status of President Obama as a "natural born" citizen, based on various theories and assertions. These cases have uniformly been summarily dismissed, either because of failure to state a claim upon which relief could be granted, because the plaintiff seeking a stay or an injunction against some future event was deemed "not likely to succeed on the merits," or because of lack of legal standing of the plaintiff.⁵⁴

Despite the absence of any formal administrative or legal requirement or oversight at the federal level, or specific state requirement to produce a birth certificate for ballot placement, it may be noted here briefly that the only "official" documentation or record that has been presented in the matter of President Obama's eligibility has been an official, certified copy of the record of live birth released by the Obama campaign in June of 2008, as an apparent effort by then-candidate Obama to address rumors and innuendos concerning the place of his birth.⁵⁵ The copy of this certificate states on its face, as certified by Hawaii health and vital records personnel, that President Obama was born in Hawaii, in the city of Honolulu on the Island of Oahu, at 7:24 P.M. on August 4, 1961.⁵⁶ Under Hawaii law, an officially certified copy of such health record is to be considered "for all purposes the same as the original,"⁵⁷ and is "*prima facie*" evidence of the facts asserted.⁵⁸ Since Hawaii became a state on August 21, 1959, all official documentation available at this time indicates that President Obama was born "in" the United States.⁵⁹

With respect to requests to "evaluate" evidence of a foreign birth, it may be noted briefly that there appear to be no official documentary records, or copies of such records, which might be subject to such evaluation. No official documents or records have been produced or forwarded contradicting the *prima facie* indications of President Obama's birth in Hawaii, as provided in the official certification (or certificate) of live birth released by the Obama campaign. No official record of birth from any other

⁵⁴ See, for example, *Berg v. Obama*, 574 F.Supp.2d 509 (E.D. Pa. 2008), *stay app. denied, petition for review denied*, 555 U.S. ____ (Supreme Court docket no. 08-570, December 9, 2008, and December 17, 2008); *Wrotnowski v. Bysiewicz, Secretary of the State of Connecticut*, 958 A.2d 709 (Conn. 2008), *stay app. denied*, 555 U.S. ____ (2008) (Supreme Court docket no. 08A469, December 15, 2008); *Donofrio v. Wells (Secretary of State of New Jersey)*, Motion No. AM-0153-08T2, *stay app. denied*, 555 U.S. ____ (2008) (Supreme Court docket no. 08A407, December 8, 2008); *Hollister v. Soetoro*, Civil Action No. 08-2254 (D.D.C. March 5, 2009); *Keyes v. Bowen*, Case No. 34-2008-80000096-CU-WM-GDS (Sup. Ct. Cal. March 13, 2009); *Stamper v. United States*, case No. 1:08 CV 2593 (N.D. Ohio 2008); *Cohen v. Obama*, Civil Action No. 08 2150 (D.D.C. 2008).

⁵⁵ A scanned copy of the official certification of the record of live birth was "released" by the Obama campaign and made available on the candidate's website (<http://fightthesmears.com/articles/5/birthcertificate>). The campaign reportedly invited a non-partisan, apparently independent, organization involved in public policy and the political process to examine the certificate, that is, "factcheck.org," a project of the University of Pennsylvania's Annenberg Public Policy Center. See discussion at www.factcheck.org/elections-2008/print_born_in_the_usa.html, and the *St. Petersburg Times*' "Politifact.com," which describes itself as "a project of the St. Petersburg Times to help you find the truth in politics" ("Obama's birth certificate: Final chapter": <http://www.politifact.com/truth-o-meter/article/2008/jun/27/obamas-birth-certificate-part-ii>). Note also discussion in Wikipedia (http://en.wikipedia.org/wiki/Barack_Obama_citizenship_conspiracy_theories).

⁵⁶ In addition to the attestation on the document that the certificate was a "true copy" of the birth records on file, official personnel of the State of Hawaii verbally indicated that such records were on file at the Department of Health. Hawaii Department of Health, News Release, "Statement by Dr. Chiyome Fukino," October 31, 2008; see Honolulu Star-Bulletin, "Officials verify birth certificate of Obama," November 1, 2008. Note also contemporaneous newspaper announcements of Obama birth in August of 1961 in Honolulu, e.g., *The Sunday Advertiser*, "Health Bureau Statistics," p. B-6, August 13, 1961.

⁵⁷ Hawaii Revised Statutes Ann., § 338-13.

⁵⁸ Hawaii Revised Statutes Ann., § 338-41(b).

⁵⁹ Even if one were born in Hawaii prior to statehood, federal law provides that any person "born in Hawaii on or after April 30, 1900, is a citizen of the United States at birth." 8 U.S.C. § 1405.

jurisdiction or country has been produced, no contradictory health record or hospital record has been forwarded, no official record of travel (such as a passport record or passenger manifest) appears to exist placing President Obama's mother in a foreign country at the time of the President's birth.⁶⁰ Rather, there have been several theories, allegations, and self-generated "questions" concerning the place and circumstances of President Obama's birth which, as noted in court decisions, have been posited on the Internet and "television news tabloid[s]," and upon which several of the lawsuits were based.⁶¹

In some of the cases filed, plaintiffs have argued that even if President Obama had been born in Hawaii, the removal to Indonesia of his mother with him at the time he was a minor in some way "nullified" the citizenship-at-birth status of President Obama, even though as a minor he moved back to and resided within the United States.⁶² It should be noted initially, however, that the Supreme Court has clearly ruled that a citizen at birth, such as one born "in" the United States, does *not* forfeit his or her citizenship-at-birth status because of removal as a minor to a foreign country, even a country in which one or both parents are or become citizens and nationals. Rather, citizenship may only be forfeited by a citizen of the United States by an affirmative action of renunciation by one having that capacity (that is, as an adult):

It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.

* * *

Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. [footnotes omitted] It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking.⁶³

Other suits, which were also summarily dismissed, alleged that even if President Obama had been born in Hawaii, he was not a "natural born" citizen because his father was not a United States citizen, but rather was a citizen of Kenya and therefore a British subject. It was argued that President Obama at birth would

⁶⁰ In *Liacakos v. Kennedy*, 195 F. Supp. 630, 632-633 (D.D.C. 1961), the court found that "a record of birth contemporaneously made by governmental authority in official records would be almost conclusive evidence of birth." However, with no such official *foreign* (or domestic) contemporaneous documentation, a "delayed birth certificate" produced by the plaintiff, even though issued by the State of West Virginia 46 years after the alleged birth there, would provide *prima facie* evidence of "natural born citizenship." That *prima facie* evidence, un-rebutted by any official foreign documentation, along with collateral evidence of assumed citizenship, would establish "natural born" status by a "fair preponderance of the evidence." 195 F. Supp. at 633-634.

⁶¹ *Berg v. Obama*, *supra* at 513, noting plaintiff's reliance on various sources of allegations, including a "television news tabloid." See also dismissal of cases against the Ohio Secretary of State, *Neal v. Brunner*, Wayne Common Pleas case # 08CV72726; and *Greenberg v. Brunner*, Wood Common Pleas case # 08CV 1024. In the *Neal* case, as reported in *The Cincinnati Inquirer*, October 31, 2008, the judge stated: "The onus is upon one who challenges such public officer to demonstrate an abuse of discretion by admissible evidence – not hearsay, conclusory allegations or pure speculation It is abundantly clear that the allegations in Plaintiff's complaint concerning 'questions' about Senator Obama's status as a 'natural born citizen' are derived from Internet sources, the accuracy of which has not been demonstrated to either defendant Brunner or this magistrate." The basis of some of the "questions" raised in law suits appear to be the fact of the existence of other law suits, as well as disputed third-party statements. *Berg, supra* at 513; *Keyes v. Bowen*, Slip op. *supra* at 4. In *Stamper v. United States, supra*, the United States District Court noted that a court may dismiss a complaint "for lack of subject matter jurisdiction" when the "allegations of a complaint are totally implausible, attenuated, unsubstantial, frivolous, devoid of merit or no longer open to discussion," and found that the court "is not required to accept unwarranted factual inferences."

⁶² *Berg v. Obama, supra* at 513.

⁶³ *Perkins v. Elg*, 307 U.S. 325, 329, 334 (1939). See also *Rogers v. Bellei*, 401 U.S. 815, 835 (1971): "... Congress has no power, express or implied, to take away an American citizen's citizenship without his assent." *Afroyim v. Rusk*, 387 U.S., at 257."

thus have been entitled to British citizenship by operation of British laws. As one entitled to “dual citizenship,” it was argued that President Obama could not be a “natural born citizen” of the United States.⁶⁴ The Supreme Court has long made it clear, however, that one born within the boundaries and jurisdiction of the United States is a U.S. citizen “at birth,” regardless of the citizenship of one’s parents.⁶⁵ As stated recently by a United States District Court:

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).⁶⁶

Merely because a child born within the United States could have, under the operation of a foreign law, been a citizen also of that foreign nation because of a parent’s nationality or citizenship, would not affect the status of that child as a U.S. citizen “at birth” under the 14th Amendment and the federal nationality laws, since the citizenship laws or rights of other nations could not influence and impact the United States’ own determination of who its citizens at birth would be. As explained by the Supreme Court:

On her birth in New York, the plaintiff became a citizen of the United States. ... In a comprehensive review of the principles and authorities governing the decision in that case — that a child born here of alien parentage becomes a citizen of the United States — the Court adverted to the “inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.” *United States v. Wong Kim Ark*, *supra*, p. 668. As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality. [footnotes omitted] And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she lost her own citizenship acquired under our law.⁶⁷

The Supreme Court in *Perkins v. Elg* thus found that one born “in” the U.S., even of *alien* parentage, is a U.S. citizen “at birth,” and in *dicta* in the case indicated that such person is eligible to be President of the United States. The Court explained that even if that person’s parents move back to their country of origin with their child, and obtain citizenship for that child in the foreign country, such a U.S. citizen “at birth” who returns or intends to return to the United States by the age of majority remains a “natural born citizen” of the United States. Citing with approval an opinion of the Attorney General, the Supreme Court explained that such a citizen returning to the United States would qualify to be President:

One Steinkauler, a Prussian subject by birth, emigrated to the United States in 1848 ... and in the following year had a son who was born in St. Louis. Four years later Steinkauler returned to Germany taking this child and became domiciled in Weisbaden where they continuously resided. ... On

⁶⁴ See, e.g., *Donofrio v. Wells*, No. 08A407, Application for Emergency Stay to the United States Supreme Court, contending that “candidate Obama is not eligible to the Presidency as he would not be a ‘natural born citizen’ of the United States even if it were proven he was born in Hawaii, since ... Senator Obama’s father was born in Kenya and therefore, having been born with split and competing loyalties, candidate Obama is not a ‘natural born citizen’” See also *Berg v. Obama*, *supra* at 513.

⁶⁵ *Wong Kim Ark*, *supra* at 674-675; *Perkins v. Elg*, *supra* at 329, 334. Fourteenth Amendment, Sec. 1, and 8 U.S.C. § 1401(a).

⁶⁶ *Hollander v. McCain*, 566 F.Supp.2d 63, 66 (D.N.H. 2008).

⁶⁷ *Perkins v. Elg*, *supra* at 329. Note also that Chester A. Arthur, 21st President of the United States, was apparently born in the United States (although rumors were rife that he was born in Canada) in 1829 to a U.S. citizen-mother and a father who was *not* a U.S. citizen, but rather a citizen of Ireland and a British subject, although it is not clear that this fact was generally or widely known at the time. (See indication of “naturalization” of Arthur’s father in 1843. Library of Congress, microfilm file reproduced at <http://www.scribd.com/doc/11067180/William-Arthur-father-of-President-Chester-Arthur-Naturalization-certificate-1843-Congress>.)

reviewing the pertinent points in the case, including the naturalization treaty of 1868 with North Germany, the Attorney General reached the following conclusion:

“Young Steinkauler is a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States ... [even though] the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance and has acquired for himself and his son German citizenship and the rights which it carries”⁶⁸

The constitutional history and relevant case law thus indicate that one born “in” the United States, and subject to its jurisdiction, that is, when one’s parents are not official diplomatic personnel representing a foreign nation in the U.S., would be considered a U.S. citizen “at birth” or “by birth,” and thus a “natural born Citizen” of the United States, regardless of the citizenship status of that individual’s parents.

⁶⁸ *Perkins v. Elg, supra* at 330.
