

A Critique of “On the Meaning of ‘Natural Born Citizen,’” Part III

by [Joseph DeMaio](#), ©2024



“Scene at the Signing of the U.S. Constitution” by Howard Chandler Christy (1940)
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(Apr. 8, 2024) — [See the previous installments in this series [here](#) and [here](#).

The writer first presents text from Paul Clement and Neal Katyal’s 2015 subject [essay](#) followed by his own commentary in bold, indented text. Page breaks in the original C&K text are indicated in brackets.]

Deep Dive Part 3

“While the field of candidates for the next presidential election is still taking shape, at least one potential candidate, Senator Ted Cruz, was born in a Canadian hospital to a U.S. citizen mother.¹⁵ Despite the happenstance of a birth across the border, there is no question that Senator Cruz has been a citizen from birth and is thus a “natural born Citizen” within the meaning of the Constitution.

[Again, this statement is simple *ipse dixit* based only on the manufactured narrative that “it is so because they say it is so.” The use of the term “happenstance” seems to have as its primary goal the trivializing and marginalizing of the fact that someone was born outside of the geographic boundaries of the United States.

[In point of fact, birth “in” the country is a *sine qua non* requirement of the definition of a natural born citizen in § 212 and was of central concern as well to the Founders, as corroborated by their inclusion of the “Citizen-grandfather” clause as an exception to the highly restrictive nbC eligibility clause.]

Indeed, because his father had also been resident in the United States, Senator Cruz would have been **[subjunctive mood, relating to a hypothetical rather than actual situation]** a “natural born Citizen” even under the Naturalization Act of 1790....

[But in any event, not after the January 29, 1795 repeal of 1 Stat. 103 by 1 Stat. 414, when the “natural born” adjective modifier of “citizens” was intentionally repealed. It was not accidentally “dropped” or discarded as only a “stylistic” change as suggested by the CRS and thereafter making persons born abroad to U.S. citizen “parents,” in the plural, “citizens” only, and not “Citizens” with an upper-case “C.”]

.... Similarly, in 2008, one of the two major party candidates for President, Senator John McCain, was born outside the United States [163 // 164] on a U.S. military base in the Panama Canal Zone to a....

[This is inaccurate by omission: both of John McCain’s parents were U.S. citizens when he was born. Accordingly, the *sub rosa* intimation that only one of McCain’s parents – “a” mother – was a citizen sufficient to bestow purported nbC status – like the situation of Senator Cruz – is misleading.]

.... U.S. citizen parent.¹⁶ Despite a few spurious suggestions to the contrary, there is no serious question that Senator McCain was fully eligible to serve as President, wholly apart from any murky debate about the precise sovereign status of the Panama Canal Zone at the time of Senator McCain’s birth.¹⁷

[As to the assertion that John McCain was born to “a” U.S. citizen parent, while true that his mother, who actually gave birth, was a U.S. citizen when he was born, so too was his father. The suggestion that McCain otherwise satisfied the nbC definition despite only one parent being a citizen is misleading.

[As for the “murky debate” over the status of the Canal Zone, again, like the marginalizing of the “happenstance” that Senator McCain was born in a place *other* than “in the United States,” as required under § 212, the clouding of the issue with adjectives like “murky” is of little assistance in resolving precisely what the Founders intended in adopting the nbC term into the Constitution.

[As to the claim that there is “no serious question that Senator McCain was fully eligible to serve as President...,” the authors might wish to look closer into the record and decision in [Hollander v. McCain](#). There, the court noted that its decision to deny relief and dismiss the plaintiff’s complaint was based on a lack of “standing” in the plaintiff, Fred Hollander, adding that “[t]he 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) If there are other sources for the claim that "no serious question" existed regarding Senator McCain's purported eligibility, it would help if they were disclosed in the article.]

.... Indeed, this aspect of Senator McCain's candidacy was a source of bipartisan accord. The U.S. Senate unanimously agreed that Senator McCain was eligible for the presidency, resolving that any interpretation of the natural born citizenship clause....

[As to the manufactured neologism "natural born citizenship clause," there is no such thing as the "natural born citizenship clause" in the Constitution. The purported "natural born citizenship" phrase is a neologism that appears nowhere in any U.S. Supreme Court case, as discussed [here](#).

[Any mislabeling of Art. 2, § 1, Cl. 5 as such is an improper way of attempting to equate or analogize it to the term "citizenship" as defined under federal statutory law as well as under the 14th Amendment as construed in the *Wong Kim Ark* case. In addition, Senate Resolution 511, (cited by C&K in footnote 18, *post*) remains fatally flawed, as discussed [here](#).

[Aside from the fact that a Senate resolution can express only the "sentiment" of the body and carries zero precedential or legal weight, S. Res. 511 is premised, in large part, on the false notion that the "rationale" of 1 Stat. 103 – stating that persons born "beyond sea" to U.S. citizen parents were *considered* to be nbC's – persists to the present day *despite* the provision having been repealed in 1795 (*not* re-enacted "in the same words," as Justice Gray claimed in *WKA* in 1898), and has never thereafter been included in any congressional enactment regarding naturalization.]

.... as limited to those born within the United States was "inconsistent with the purpose and intent of the 'natural born Citizen' clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term 'natural born Citizen.'"¹⁸
....

[To reiterate, the assertion that 1 Stat. 103 "defined" the nbC term is manifestly wrong. While the statute *categorized* certain individuals as being "considered" as natural born citizens, it made no attempt to *define* the term. Any contention to the contrary is clearly without support and inaccurate.

[In addition, regarding the statements in S. Res. 511 that "there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children from serving as their country's President..." and adding that "such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen..." several comments are necessary.

[First, while there may be no Founders' expression of intent to "limit" or "preclude" such persons from eligibility, there is *also* no expression of intent to *ratify* such eligibility in a way that is inconsistent with the Constitution's nbC clause.

[Moreover, while the resolution addresses the "military" question both in terms of the parents' service in the armed forces as well as such service "outside of our national borders" and adds that other presidential candidates born outside of our borders "were understood to be eligible..." that does not suffice to establish, in actuality under the Constitution, that it is what the Founders intended.

[This is yet another reason supporting the conclusion that by enacting 1 Stat. 414, Congress sought to correct the error in 1 Stat. 103 erroneously asserting that children born to U.S. citizen parents abroad were only to be "*considered*" – as contrasted with being declared – "actual" nbC's.

[Second, to reiterate, 1 Stat. 103 did *not* define the nbC term: instead, it only *categorized* certain people as being "considered" as being such. The only "definition" of the nbC term utilizing the word "citizen" – as opposed to a "subject" extracted from British common law – which was available and known to the Founders in 1787 was that set out in § 212.

[The *non-sequitur* trope that the Founders merely intended to substitute the word "citizen" for the word "subject" in purportedly adopting the nbC term in the Constitution is illogical. To contend that the Founders – having then recently thrown off the oppressive British yoke of "subject/liege" in favor of "citizen/republic" – would nonetheless adopt a British common law definition of nbC *reinstating* the principles of a subservient "subject" through grammatical legerdemain makes no sense.

[Third, on the other hand, it can rationally be argued that children born to U.S. citizens who are serving in the United States military abroad – a circumstance virtually *unknown* to the Founders and certainly not reasonably *foreseen or foreseeable* by them in 1787 – ought to be treated as a special class also eligible to the presidency. Their parents' allegiance and fidelity to the United States, particularly in an era of voluntary military service, cannot reasonably be challenged.

[*However*, in order to accomplish that goal – arguably, a laudable one – the solution is a formal constitutional amendment and *not* a "resolution" lacking the force of law. This is particularly so when the resolution relied upon to support Senator McCain was fatally flawed from the outset as being conceptually premised on the discarded rationale of a statute that Congress had entirely repealed 213 years earlier.

[Indeed, such a constitutional amendment could serve the same practical and salutary function today as did the "Citizen-grandfather" clause when added to the nbC provision in 1787. Moreover, not only would such an amendment likely be

widely supported, ensuring swift ratification by the required 38 states, it would adhere to the Constitution's Article V requirement dictating that alterations in the Constitution should be the result of formal amendments rather than Congressional resolutions, incompatible statutes or the isolated pontifications of academics and other extra-judiciary "experts."]

.... And for the same reasons, both Senator Barry Goldwater and Governor George Romney were eligible to serve as President although neither was born within a state. Senator Goldwater was born in Arizona before its statehood and was the Republican Party's presidential nominee in 1964,¹⁹ and Governor Romney was born in Mexico to U.S. citizen parents and unsuccessfully pursued the Republican nomination for President in 1968.²⁰

[To reiterate, there has never been a Supreme Court decision "on the merits" addressing the nbC question in the context of a sitting president (or vice-president), and certainly not in the cases of Senator Goldwater or Governor Romney.

[This is why the issue is still being debated, although the currently-accepted narrative that one need only be born a citizen – whether here or anywhere on the planet "by happenstance" under the C&K view – has many adherents. That theory requires a much relaxed historical and legal analysis and posits, at the end of the day, that "it is close enough for government work." The Founders likely would *not* agree.]

"There are plenty of serious issues to debate in the upcoming presidential election cycle. The less time spent dealing with specious objections to candidate eligibility, the better. Fortunately, the Constitution is refreshingly clear on these eligibility issues.

[The manufactured "refreshingly clear" descriptor makes sense only if it means "obscure" or "opaque." Again, it is regrettable that two former Solicitors General must deploy such inconsistent language in an effort to drive home a highly debatable point. There is nothing "specious" about objections to a presidential candidate's constitutional eligibility *bona fides*, particularly in the absence of a Supreme Court decision directly on point, the *ex-cathedra* *bona fides* of the authors aside.

[Moreover, if, as claimed by the authors, the Constitution *itself* is "refreshingly clear on these eligibility issues," they should offer an explanation for the Supreme Court's contrary finding in *Minor* that "the Constitution does *not*, in words, say who shall be natural-born citizens. Resort must be had *elsewhere* to ascertain that." *Ipsa dixit* founded on careless language that Congress identified in 1 Stat. 103 and repealed in 1 Stat. 414 229 years ago is *not*, respectfully, "close enough for government work."

[Again, and tellingly, the C&K authors ignore altogether the de Vattel treatise, which provides "elsewhere" than the Constitution, in § 212 of the tome, the precise "words" the Court in *Minor* found to be missing in the founding document. In

addition, the term “**specious**” is defined as “having a false look of truth or genuineness.”

[Against the backdrop of the Founders’ overriding goal of establishing a *higher*, rather than *lower*, barrier to the potential for insinuation of foreign influence into the presidency, it makes no sense at all to contend, without analysis, that the lower barrier presented by a “citizen at/by birth” standard – regardless of place of birth and citizen status for *both* parents – was intentionally selected by the Founders.

[Such an argument would also run directly contrary to Justice Story’s observation that the Founders’ goal in selecting the nbC restriction was to “cut off *all* chances for ambitious foreigners...” to insinuate themselves into the presidency. The term “all” does *not* mean “some” or “a few” chances, which latter terms are inherent in the “citizen at/by birth” theory of nbC bona fides. Stated otherwise, the term “all” encompasses the *totality* of relevant elements, not just “some” or a “few.” This is not a situation where one needs to parse what the meaning of “all” ... is.

[In fact, the C&K article’s citation to Justice Story’s “cut off *all* chances...” quote in and of itself *alone* eviscerates the article’s contention that only one parent need be a citizen at the time of the child’s birth. This is plainly so because the other “foreign” or “non-citizen” parent would, under *jus sanguinis* (law of blood or descent) principles, automatically inject “some” or even a “50%” likelihood of foreign influence being insinuated into the person who would serve as the president.

[Furthermore, that foreign citizen’s nation – say, Argentina – could then, quite apart from the position taken by the child or, in fact, the United States, plausibly make the argument that the child was, at minimum, part Argentinian. This potential would *never* have been acceptable to the Founders, yet it is advanced as being entirely consistent with the “citizen at/by birth” theory of the C&K article.

[In addition, the term “spurious” is defined as “forged or of falsified or erroneously attributed origin.” Neither of those terms are properly applied to the argument that, as intended by the Founders, a “natural born Citizen” was a person born in the United States to two parents, both of whom were at the time of birth U.S. citizens.

[This is consistent, rather than at variance, with the definition of the term set out in § 212. The marginalization of de Vattel by C&K – again, neither he nor his treatise are even *mentioned*, even in passing, in the article – is regrettable. Even the WKA “holy grail” decision – hailed by “de Vattel Deniers” as “settling” the nbC issue (hint: no, it doesn’t) – cites and discusses de Vattel as well as § 212.]

.... To serve, an individual must be at least thirty-five years old and a “natural born Citizen.” Thirty-four and a half is not enough and, for better or worse, a naturalized citizen cannot serve. But as Congress has recognized since the Founding, a person born abroad to a U.S. citizen parent is generally a U.S. citizen from birth with no need for

naturalization. And the phrase “natural born Citizen” in the Constitution encompasses all such citizens from birth.

[This bald statement constitutes plain and simple *ipse dixit* and is fundamentally at odds with both logic and the historical record.]

Thus, an individual born to a U.S. citizen parent — whether in California or Canada or the Canal Zone — is a U.S. citizen from birth and is fully eligible to serve as President if the people so choose.” (End of C&K article)

[Respectfully..., there is another interpretation which your servant posits is far more consistent with the history of the Eligibility Clause, the principles of § 212 and, of greatest importance, the intent of the Founders.]

Deep Dive Conclusion

All of the foregoing verbiage aside – from the arguments of two very smart former officials of the Solicitor General’s Office to those of your humble servant – the end resolution of the nbC question lies either in a binding decision of the Supreme Court or a ratified amendment of the Constitution. Neither of those two solutions seems likely in the near term, lamentably, because the vast majority of the body politic is simply indifferent to the issue. So the debate will continue. Move along..., nothing to see here. Sad.

FOOTNOTES:

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1 U.S. CONST. art. II, § 1, cl. 5.

2 *See, e.g.*, 8 U.S.C. § 1401(g) (2012); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 303, 66 Stat. 163, 236–37; Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797.

3 *See* Smith v. Alabama, 124 U.S. 465, 478 (1888).

4 *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888). 162 HARVARD LAW REVIEW FORUM [Vol. 128:161

5 *See* United States v. Wong Kim Ark, 169 U.S. 649, 655–72 (1898).

6 7 Ann., c. 5, § 3 (1708); see also British Nationality Act, 1730, 4 Geo. 2, c. 21.

7 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *354–63.

8 Ch. 3, 1 Stat. 103 (repealed 1795).

9 *Id.* at 104 (emphasis omitted).

10 *See* Christina S. Lohman, Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause, 36 GONZ. L. REV. 349, 371 (2000/01).

11 *See, e.g.*, British Nationality Act, 1730, 4 Geo. 2, c. 21. 2015] ON THE MEANING OF “NATURAL BORN CITIZEN”

12 Letter from John Jay to George Washington (July 25, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61 (Max Farrand ed., 1911).

13 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473, at 333 (1833).

14 *See* Michael Nelson, Constitutional Qualifications for President, 17 PRESIDENTIAL STUD. Q. 383, 396 (1987).

15 *See* Monica Langley, Ted Cruz, Invoking Reagan, Angers GOP Colleagues But Wins Fans Elsewhere, Wall St. J. (Apr. 18, 2014, 11:36 PM), <http://www.wsj.com/articles/SB10001424052702303873604579494001552603692>. 164 HARVARD LAW REVIEW FORUM [Vol. 128:161

16 *See* Michael Dobbs, John McCain’s Birthplace, WASH. POST: FACT CHECKER (May 20, 2008, 6:00 AM), http://voices.washingtonpost.com/fact-checker/2008/05/john_mccains_birthplace.html [<http://perma.cc/5DKV-C7VE>].

17 *See, e.g.*, Laurence H. Tribe & Theodore B. Olson, Opinion Letter, Presidents and Citizenship, 2 J.L. 509 (2012).

18 S. Res. 511, 110th Cong. (2008).

19 *See* Bart Barnes, Barry Goldwater, GOP Hero, Dies, WASH. POST, May 30, 1998, <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwater30.htm> [<http://perma.cc/K2MG-3PZL>].

20 *See* David E. Rosenbaum, George Romney Dies at 88; A Leading G.O.P. Figure, N.Y. TIMES, July 27, 1995, <http://www.nytimes.com/1995/07/27/obituaries/george-romney-dies-at-88-a-leading-gop-figure.html>

