

A Deeper Dive Into the nbC Pond

by [Joseph DeMaio](#), ©2023



[Kanenori, Pixabay, License](#)

(Jun. 26, 2023) — **Introduction**

Faithful *P&E* readers, two events precipitate this offering, which is intended to examine more closely one of the favorite “authorities” normally cited by the Left in its quest to redefine the term “natural born Citizen” as included by the Founders in Art. 2, § 1, Cl. 5 of the Constitution, the presidential “Eligibility Clause.”

The “authority” to be examined in this “deeper dive” is the March 2015 article produced by former U.S. Solicitors General Paul Clement (a Republican nominated by President George W. Bush) and Neal Katyal (a Democrat replacing Elena Kagan when President Obama elevated her to the Supreme Court) entitled “[On the Meaning of Natural Born Citizen](#).” And because this dive will be detailed and lengthy, of necessity, it will need to be divided into sections and, accordingly, readers are encouraged to keep supplies of their favorite caffeinated beverage nearby.

As a prefatory matter, it must be acknowledged that Messrs. Clement and Katyal, being former U.S. Solicitors General – the pinnacle of litigants for the United States before the U.S. Supreme Court – are extremely well-credentialed and, by the way..., smart. That said, even well-credentialed and smart lawyers can take legal positions at odds with other, contrary legal positions: that is why lawyers exist for their respective clients.



<https://harvardlawreview.org/forum/vol-128/on-the-meaning-of-natural-born-citizen/>

The article appeared in the Harvard Law Review Forum – a periodical not to be confused with the Harvard Law Review Journal published by the law school – at a time corresponding to the March 23, 2015 announcement by Senator Ted Cruz (R. TX) that he would be a candidate for the GOP nomination for president in the 2016 primary. Unsurprisingly, the article concluded that Sen. Cruz was eligible as a “natural born Citizen” (“nbC”) under Art. 2, § 1, Cl. 5 of the Constitution.

There is no evidence that Sen. Cruz (a former Solicitor General of Texas) and Messrs. Clement and Katyal collaborated or coordinated their respective March, 2015 efforts. Again, all three men – Messrs. Cruz, Clement and Katyal – are intelligent, honorable and well-credentialed attorneys..., but on the nbC issue, we differ dramatically. Nothing personal, but even smart folks can on occasion err..., including your [faithful servant](#).

The conclusion that Sen. Cruz was an eligible nbC was originally questioned by your humble servant [here](#) and [here](#). For readers interested in a brief “preview” of what follows, they may wish to revisit those prior posts. The current offering will continue to challenge the Clement-Katyal conclusion that one need only be a “citizen at birth” or a “citizen by birth” with no need for further “naturalization” processing in order to be eligible to the presidency (or vice presidency) as a natural born Citizen. It is posited that this conclusion is at direct odds with the concerns of the Founders – and acknowledged by all sides of the debate – that all available measures be taken to prevent the insinuation of “foreign influence” into the office of the new constitutional republic’s “Chief Magistrate,” the President.



The first event prompting the deeper dive, of course, is the announced intention of [Brandon](#) and his vice-president, Kamala Harris, to again run for the nomination to be the Democrat candidates for President and Vice-President in the upcoming November 2024 general election. As the wreckage of their first term proves, a second term under those

intellectual termites would be a cataclysmic disaster, particularly if, for whatever reason, Brandon were to be replaced by Harris as president.

The second event is the disclosure of a list of candidate debate qualifications or “[criteria](#)” recently announced by the Republican National Committee (“RNC”). That “vetting” document is intended to govern the upcoming debates among GOP candidates for nomination as that party’s choice for president. The very first requirement under the first “Candidate Status” category is: “Be eligible to run ([be a] natural born U.S. citizen, resident for 14+ years, 35 years or older).”

Unlike the Democrats, at least it seems as though the GOP is “going through the motions” of requiring proof that the eventual nominee will, at minimum, be a “natural born Citizen” as restricted by the Constitution. The critical question, however, remains: which definition of a “natural born Citizen” will the RNC impose and enforce? Will it enforce (a) the person must be born here to parents who are already U.S. citizens criterion, or (b) the “citizen at/by birth” with no need for birth here or further naturalization necessary, and the citizenship of both parents aside version?

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

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

* Articles of Confederation, § 3, 1 Stat. at Large, 4.
† Article 2, § 1.
‡ Article 1, § 8.

[Minor v. Happersett](#)

Your humble servant posits that the correct answer should be “(a)” rather than “(b)” since, regarding the Founders under the nomenclature of the day, they understood that while there were doubts as to “b,” there were never any doubts as to “a.” On the other hand, the generally-accepted (if erroneous) definition and incessantly repeated narrative is “b,” so do not be surprised if the RNC takes this easier way out..., move along..., it’s settled..., nothing to see here....

Curious? Read on.

Look for Part 2 on Tuesday.