

A Small Fly in the nbC Ointment...

Welcome Back!

by [Joseph DeMaio](#), ©2024



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(Dec. 31, 2024) — When people identify a minor problem within an otherwise acceptable situation, they sometimes say, “There’s a fly in the ointment.” A succinct definition of the phrase and its meaning is found in the Cambridge Online Dictionary, [defining](#) it thusly: “a [single](#) thing or [person](#) that is [spoiling](#) a [situation](#) that could have been very [positive](#) or [enjoyable](#).”

As brief backdrop, and as faithful *P&E* readers know, your humble servant has for years pontificated here at *The P&E* on the “natural born Citizen” (“nbC”) presidential eligibility issue under Art 2, § 1, Cl. 5 of the Constitution. Your servant has posited and advocated that the Founders adopted the definition set out by Swiss attorney, judge and legal scholar Emer de Vattel in § 212 (hereinafter “§ 212,”) from Book 1, Ch. 19 of his 1758 seminal treatise, *Le Droit des Gens*, or *The Law of Nations*. In short, that definition – posed as being intentionally selected by Founder John Jay, then submitted to Constitutional Convention Chairman George Washington and thereafter adopted *without dissent* by the Founders – refers to a person born “in” (“*dans*,” in French) a country to “two parents,” (“*parens citoyens*,” in French) a mother and a father, who are already at the time of birth citizens of that country. It is that simple.

In 1787, this definition would have provided the highest available barrier to the potential for the insinuation of “foreign influence” into the presidency and would have satisfied the Founders’ desire to *preclude*, not merely frustrate or impede the potentials for such

insinuation. The § 212 definition would thus have been a higher barrier to foreign influence and thus superior to the “citizen at/by birth, regardless of parental citizenship or country of birth” narrative marketed today by the Congressional Research Service and others. It is plainly counterintuitive – and moreover highly likely false – that the Founders would consciously have preferred and selected the *lower* barrier over the *higher* barrier, yet that is the necessary conclusion burdening the non-§ 212 definition of an nbC.

But I digress.

In 2008, Senators John McCain and Barack Hussein Obama, II were running for the presidency. McCain was selected as the GOP candidate to face Obama, but only after lingering questions about the “nbC” eligibility status of *McCain*, rather than Obama, were hurdled. Obama’s bare claim that he was born in Honolulu, Hawai’i was accepted virtually without either competent evidentiary proof that he was an nbC or that he was actually even born in Honolulu. The main nugget of anecdotal “proof” that he was born there was a birth *announcement* placed in a Honolulu newspaper, purportedly by his grandmother, rather than his father or mother. No birth certificate – its authenticity aside – was presented at that time. The election took place, and the rest, as they say, is history.

As for McCain, he was not born “in” the United States proper but instead was born in either (the record is still unclear) (a) the military hospital at the Coco Solo Naval Air Station in the Panama Canal Zone, or (b) in a civilian hospital in Colón, Panama. In an attempt to fortify his eligibility as an nbC, the U.S. Senate promulgated and enacted Senate Resolution 511 (“S.Res. 511”). Your humble servant addressed and critiqued that resolution [here](#).



Former U.S. Solicitor General Theodore (Ted) Olson ([public domain](#))

Recently, however, your servant had occasion to revisit some additional history surrounding the resolution..., and that is when the “fly in the ointment” appeared. As part of the events surrounding the passage of S.Res. 511, the then-Chairman of the Senate Judiciary Committee, Senator Patrick Leahy (D. VT), had asked for a legal opinion on the issue. The request was *not*, interestingly enough, made to attorneys at the Congressional Research Service, but instead to former U.S. Department of Justice Solicitor General [Ted Olson](#), who served in that capacity between 2001 and 2004 under President George W. Bush. Regrettably, Ted Olson passed on to that great courtroom in the sky last month on November 13, 2024.

Back to text: on April 8, 2008, Ted Olson responded to Senator Leahy in a letter (concurring in, parenthetically, by Hah-vahd Law Professor Laurence Tribe) concluding, for a variety of reasons, that Senator McCain was, in fact, an nbC eligible to the presidency. Note that Professor Tribe is the same “expert” who assured everyone that Donald Trump was guilty of “insurrection” under the 14th Amendment and for that reason – and without a trial – would properly be [excluded](#) from state general election ballots in 2024. In [Trump v. Anderson](#), the Supreme Court booted Tribe and his “constitutional expertise” to the sidelines, and as a result, we soon will see Donald Trump inaugurated as the 47th President of the United States.

April 30, 2008

CONGRESSIONAL RECORD—SENATE

S3645

JOHN S. MCCAIN, III CITIZENSHIP

Mr. BROWN. Mr. President, I ask unanimous consent the Senate proceed to the immediate consideration of Calendar No. 715, S. Res. 511.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows: A resolution (S. Res. 511) recognizing that John Sidney McCain, III, is a natural born citizen.

There being no objection, the Senate proceeded to consider the resolution.

Mr. LEAHY. Mr. President, today we are considering a bipartisan resolution to express the common sense of all in this Chamber that Senator McCain is a “natural born Citizen,” as the term is used in the Constitution of the United States. Last week the Judiciary Committee voted unanimously to report this resolution to the Senate. I urge Senators to come together to pass this bipartisan resolution without delay.

Our Constitution contains three requirements for a person to be eligible to be President—the person must have reached the age of 35; must have resided in America for 14 years; and must be a “natural born Citizen” of the United States. Certainly there is no doubt that Senator McCain is of sufficient years on this Earth and in this country given that he has been serving in Washington for over 35 years. However, some have raised the question whether he is a “natural born Citizen” because he was born outside of the United States.

JOHN SIDNEY MCCAIN, III, was born to American citizens on an American Naval base in the Panama Canal Zone in 1936. His father was serving in the Navy at that time.

It is possible that at the time of our Nation’s founding, the Framers of our Constitution could not imagine how pronounced our commitments overseas would become but it would make no sense to limit the careers of children born to military families simply because they were stationed overseas. Similarly, it would not make sense to

George Romney, was also born outside of the United States. He was widely understood to be eligible to be President. Senator Barry Goldwater was born in a U.S. territory that later became the State of Arizona. Certainly those who voted for these two Republican candidates believed that they were eligible to assume the office of the President.

Because he was born to American citizens, there is no doubt in my mind that Senator McCain is a “natural born Citizen.” I recently asked Secretary of Homeland Security Michael Chertoff, a former Federal judge, if he had any doubts in his mind. He did not. Former Solicitor General Theodore Olson and Harvard Law School Professor Laurence Tribe also analyzed the issue and came to the same conclusion—that Senator McCain is a natural born citizen eligible to serve as President.

Our bipartisan resolution would make it clear that Senator McCain, born in 1936 on an American Naval base to U.S. citizens, is a “natural born Citizen.” We should act today on a bipartisan basis to erase any doubt that Senator McCain is eligible to run for President because of his citizenship status.

I ask unanimous consent that the legal analysis of Theodore Olson and Laurence Tribe be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OLSON, DUNN & CRITCHER LLP,
Washington, DC, April 5, 2008.

Re legal analysis of question whether Senator John McCain is a natural born citizen eligible to hold the office of President.

HON. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: Pursuant to a request received from the staff of your Committee, I enclose for your and your Committee’s consideration a copy of my and Professor Laurence Tribe’s analysis of the question whether Senator John McCain is a natural-born citizen eligible, under Article II of the Constitution, to hold the office of President of the United States. Professor Tribe

the office of President of the United States. Professor Tribe and I are in agreement that the circumstances of Senator McCain’s birth to American parents in the Panama Canal Zone make him a natural born citizen within the meaning of the Constitution.

Please do not hesitate to contact me if I can be of further assistance in this matter.

Very truly yours,

THEODORE B. OLSON.

MARCH 19, 2008.

We have analyzed whether Senator John McCain is eligible for the U.S. Presidency, in light of the requirement under Article II of the U.S. Constitution that only “natural born Citizen(s) . . . shall be eligible to the Office of President.” U.S. Const. art. II, § 1, cl. 5. We conclude that Senator McCain is a “natural born Citizen” by virtue of his birth in 1936 to U.S. citizen parents who were serving their country on a U.S. military base in the Panama Canal Zone. The circumstances of Senator McCain’s birth satisfy the original meaning and intent of the Natural Born Citizen Clause, as confirmed by subsequent legal precedent and historical practice.

The Constitution does not define the meaning of “natural born Citizen.” The U.S. Supreme Court gives meaning to terms that are not expressly defined in the Constitution by looking to the context in which those terms are used; to statutes enacted by the First Congress, *Marsh v. Chambers*, 403 U.S. 767, 790-91 (1963); and to the common law at the time of the Founding, *United States v. Wong Kim Ark*, 169 U.S. 480, 485 (1898). These sources all confirm that the phrase “natural born” includes both birth abroad to parents who were citizens, and birth within a nation’s territory and allegiance. Thus, regardless of the sovereign status of the Panama Canal Zone at the time of Senator McCain’s birth, he is a “natural born” citizen because he was born to parents who were U.S. citizens.

Congress has recognized in successive federal statutes since the Nation’s Founding that children born abroad to U.S. citizens are themselves U.S. citizens. 8 U.S.C. 1401(c); see also Act of May 24, 1864, Pub. L. No. 33-286, 41, 43 Stat. 797, 797. Indeed, the statute that the First Congress enacted on this subject not only established that such children are U.S. citizens, but also expressly referred to them as “natural born citizens.”

Senator McCain’s status as a “natural born” citizen by virtue of his birth to U.S. citizen parents is consistent with British statutes in force when the Constitution was drafted which authorized the admission of

<https://www.congress.gov/crec/2008/04/30/CREC-2008-04-30-pt1-PgS3645.pdf>

Tribe's muddled thinking aside, and in observance of full disclosure, Mr. Olson's opinion letter, again, concurred in by Tribe, concluded that Senator McCain was, in fact and law, an nbC eligible to the presidency. That letter was entered into the Congressional Record on April 30, 2008, when the Senate formally [resolved](#) that Sen. McCain was an nbC. Without boring into the details of Mr. Olson's analysis, suffice it to say that it arrives at the same conclusion as the CRS "products" and the 2015 Clement-Katyal Harvard Law Review Journal [article](#), "*On the Meaning of Natural Born Citizen*," i.e., that Senator McCain was a "citizen at birth" or "citizen by birth" to two American citizens, despite his birth beyond the soil of the United States. Thus, concluded Mr. Olson, McCain was an nbC eligible to the presidency.

Like the CRS products and the Clement-Katyal article as to Senator Ted Cruz, the Olson letter makes no mention of Emer de Vattel; nor does it address the "never as to the first" statements of the Supreme Court in [Minor v. Happersett](#); nor does it address or explain the impact of Justice Gray's patent blunder in the [WKA](#) case, erroneously claiming that the Congress reenacted "in the same words" the "natural born" modifier of "citizens" of 1 Stat. 103 (1790) when in fact and reality, it repealed, in its entirety, 1 Stat. 103 by enacting 1 Stat. 414 in 1795, discussed [here](#).

Most significantly, the Olson analysis offers no rationale or explanation whatsoever for why, under the CRS "citizen at birth" or "citizen by birth" narrative, the Founders would have intentionally selected a definition of a nbC which presented a *lower* barrier to the insinuation of foreign influence into the presidency when a known *higher* barrier – the de Vattel § 212 definition, requiring birth on U.S. soil to two U.S. citizen parents – was available. None.

That said, the Olson analysis does cite one Supreme Court case – a potential "small fly in the ointment" – not heretofore mentioned that may (good news/bad news) prove to be relevant should the Supreme Court ever determine to directly address the nbC issue: [Walz v. Tax Commission of City of New York](#).

In that "non-nbC" case, one involving the tax-exempt status of churches, the Court addresses as a general legal proposition the issue of the *weight* (i.e., "how important is it?") to be properly accorded to the historical record of events and practices as bearing upon the questions presented in a particular case or controversy. The Court stated (397 U.S. at 678): "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence, and indeed predates it. *Yet an unbroken practice ... is not something to be lightly cast aside.*" (Emphasis added).

This statement does not mean that the practice cannot be voided into the future, but only that the practice must be acknowledged and analyzed *before*, if otherwise necessary, it is cast aside. And with the shady history of the CRS linguistic anomalies and mischaracterizations of dissenting opinions (e.g., the [WKA](#) dissent) seemingly calculated

to mislead the Congress, the Court and the electorate as to the persons who the Founders intended to be recognized as nbC's, the indifferent "practice" of the voters electing ineligible presidents and vice-presidents becomes one which intellectually *begs* to be "set aside."

The materiality of the Court's *Walz* statement insofar as the nbC issue is concerned lies in the fact that, on several prior occasions in the history of the Republic, persons who likely were *not* natural born Citizens were nonetheless either officially (but erroneously) recognized as being such and/or were actually elected to either the Presidency (Chester A. Arthur; Barack Hussein Obama, II) or the Vice-Presidency (Kamala Harris) despite unresolved questions regarding their respective nbC bona fides. And this does not even touch the respective political parties' practices of allowing persons of questionable nbC *bona fides* to compete as candidates in primary races. Such persons would include, for example, [Nikki Haley](#); [Marco Rubio](#); [Vivek Ramaswamy](#); and [Tulsi Gabbard](#).



<https://www.supremecourt.gov/>

Those historical facts – problematic and likely unconstitutional as they may have been – could well, under the "unbroken practice" statement from the *Walz* case, provide the Court with a convenient "out" or "escape route" for the Justices to continue "evading" the issue or even actually reaching a precedential decision validating and ratifying the "citizen at birth" or "citizen by birth" narrative that has been thus far successfully marketed by the CRS and others. That same conceptual result might also be reached by a Justice (or Justices) under an "[Opinion Relating to Order](#) [of Certiorari Denial]."

To reiterate, your servant posits that while the Olson letter opining that John McCain was an nbC eligible to the presidency in support of S.Res. 511, not only is that opinion letter inconsistent with the historical intent of the Founders and the "judicial dictum" in the *Minor* case discussed [here](#), it fails to explain or justify why the Founders would have adopted the "citizen at/by birth" nbC definition – with its lower "foreign influence" barrier – when the higher de Vattel § 212 barrier was available, as seemingly "hinted" by Founder John Jay in his famous [letter](#) to George Washington.



Supreme Court Justice Thomas: We're Evading Article II Eligibility Issue - 4/16/10

<https://www.youtube.com/watch?v=Eu6OiTiua08>

In conclusion, the *Walz* case may constitute a small fly in the nbC ointment, but unless and until the Supreme Court has before it an nbC case involving an actual occupant of the office of the president or vice-president, or a candidate aspiring to those offices, the “fly” may disappear and never become a problem. And with the Court continuing to “[evade](#)” the issue, that may well end up being the fate of that insect.

As Confucius is rumored to have said: “May you live in interesting times.”