Common Sense and Mr. Katyal

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(Nov. 7, 2025) — Earlier this week, the Supreme Court heard oral arguments in the case challenging President Trump's use of Tariffs. In that case – *Learning Resources Inc. v. Trump*, the now-private attorney representing the challengers was one Neal Katyal, a former Acting Solicitor General of the United States under Barack Obama. Mr. Katyal made some interesting arguments tangentially bearing upon the persistent and still unresolved "natural born Citizen" ("nbC") issue.

The tariffs case, of course, has nothing to do with the nbC presidential eligibility issue, which your humble servant for over the past decade has pontificated upon here at *The P&E.* Candidly, Mr. Katyal made a persuasive "tariff case" argument.

On the other hand, as addressed and discussed here, here and here, in 2015, Mr. Katyal (a Democrat) and one Paul Clement (a Republican and a former Solicitor General under President George W. Bush), published an article in the Harvard Law Review Journal entitled *"On The Meaning Of Natural Born Citizen."*

Long story short, that article sought to buttress the argument that Senator Ted Cruz was an eligible nbC despite being born in Calgary, Alberta, Canada and to parents, only the mother of which was a U.S. citizen, his father being a Cuban citizen when he was born. Their article espouses the theory that if one is merely a "citizen at birth" or "citizen by birth," regardless of place of birth or U.S. citizenship of ***both*** parents, that status will suffice to make one an eligible nbC. Stated otherwise, it is akin to saying "close enough for government work."

Your humble servant has, of course, disagreed with that theory, posing the question (still unanswered): why would the Founders have selected a definition of an nbC that erected a ***lower***, rather than a ***higher*** barrier against the potential for the insinuation of foreign influence into the presidency, as afforded by the definition found in § 212 of Book 1, Ch. 19 of Emer de Vattel's *The Law of Nations*? There is little if any serious disagreement over the fact that the "citizen at/by birth" definition promoted by Messrs. Clement and Katyal sets a lower impediment than does the higher de Vattel § 212 barrier requiring birth in the country where both parents are already its citizens.

But I digress. The relevance of Mr. Katyal's comments in the tariffs case lies in his specific argument that, in interpreting the words of the statute involved in that case, "… ***it comes down to common sense***." (Emphasis added). (*see* oral argument transcript [24-1287_b07d.pdf] at 98).. Mr. Katyal then added (*id.*) that "…[i]t's ***simply implausible*** that in enacting …[the tariffs statute at issue] Congress handed the President the power to overhaul the entire tariff system…." (Emphasis added).

And Mr. Katyal's comments about common sense did not go unnoticed by the Justices: *see*, *e.g.,* Justice Kavanaugh's remark (transcript at 165) that "Mr. Katyal referred to common sense several times."

These same questions arise with regard to interpreting how the Founders would have gone about shielding the presidency in the Constitution from what Publius Hamilton warned about in Federalist 68: a foreign power's elevation of a "*creature of their own* to the chief magistracy of the union." (Emphasis added) Hamilton was, of course, warning about the need to ***exclude*** – not merely ***impede or hinder*** – foreign influence from affecting the presidency.

These "Tariff case" assertions from Mr. Katyal evoke, naturally, the question: "does it comport with 'common sense' to claim that the Founders would have adopted into the Constitution the ***lower*** "citizen at/by birth" nbC definitional barrier to foreign influence when a known, ***higher*** barrier – § 212 existed?" Rocket science this is not. Far from comporting with "common sense," the "citizen at/by birth" nbC definition ***defies*** common sense. Moreover, it is entirely "implausible" to believe that the Founders would have consciously made that choice.

While Messrs. Clement and Katyal may subscribe to that view, it is highly unlikely — not to mention profoundly implausible – that the Framers of the Constitution's Eligibility Clause shared that view. Perhaps one day the Supreme Court will resolve this conundrum. Until then, the debate will continue.