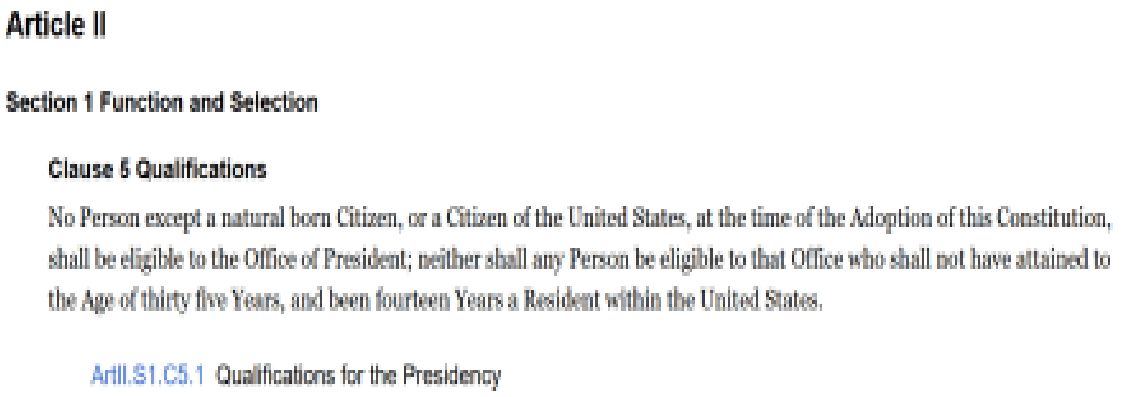
More nbC Comments: More Humble Servant Responses

by Joseph DeMaio, ©2024



Article II

Section 1 Function and Selection

Clause 5 Qualifications

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

ArtII.S1.C5.1 Qualifications for the Presidency

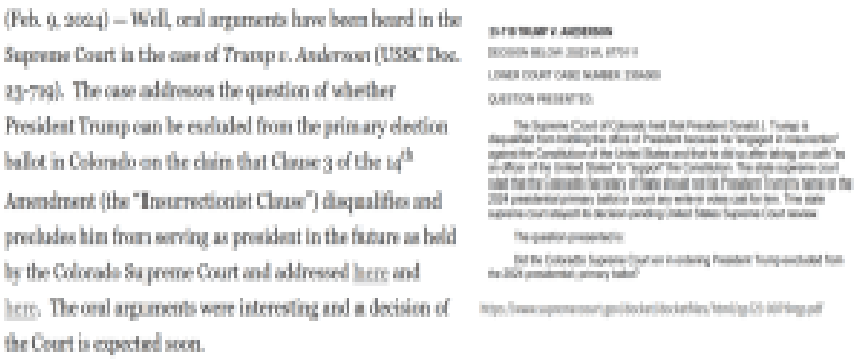
https://constitution.congress.gov/browse/article-2/section-1/clause-5/

(Feb. 13, 2024) — One of the more useful features of *The P&E* platform, apart from the topical articles appearing here, is the comments section. There, some insightful and frequently robust discussions can take place where differing views can be voiced and compete with one another. Is not the First Amendment cool, despite the efforts of many on the Left to censor and neuter its existence?

One of the topics generating some of the more spirited and robust exchanges is – that's right, Virginia – the "natural born Citizen" ("nbC") presidential eligibility issue under Art. 2, § 1, Cl. 5 of the Constitution. That provision restricts eligibility (not "qualification") to the presidency to a "natural born Citizen, or a Citizen of the United States, at the time of the adoption of this Constitution…."

It is assumed that most, if not all who are reading this offering, are generally familiar with the competing theories of what the nbC term actually meant to the Founders in 1787 when they were drafting the Constitution. For a quick "refresher course," some may wish to review this post.

In addition, from time to time it is useful to explore in more detail some of the comments submitted to posts addressing the issue. That has happened several times in the past, as for example here and here.



(Feb. 9, 2024) – Well, oral arguments have been heard in the Supreme Court in the case of *Trump v. Anderson* (USSC Doc. 23-719). The case addresses the question of whether President Trump can be excluded from the primary election ballot in Colorado on the claim that Clause 3 of the 14th Amendment (the "Insurrectionist Clause") disqualifies and precludes him from serving as president in the future as held by the Colorado Supreme Court and addressed here and here. The oral arguments were interesting and a decision of the Court is expected soon.

https://www.thepostemail.com/2024/02/09/the-ussc-oral-arguments-in-trump-v-anderson/

Such a time again presents itself regarding multiple comments offered by commenter Joe Leland to a recent article by your humble servant addressing references to the nbC issue occurring at the recent Supreme Court oral arguments in *Trump v. Anderson*. That is the case where the Colorado Secretary of State is attempting to keep President Trump off the primary ballot on the claim that he is an "insurrectionist" barred under the 14th Amendment. Your servant addressed that mile-high anomaly here.

Mr. Leland offers many comments relating to the nbC issue as discussed in your servant's "Anderson" article, and readers are encouraged to review those comments…, and perhaps offer their own comments.

As for the present article you are reading, the objective will be to respond to and counter some selected comments offered by Mr. Leland. There are many responses that might be made, but a complete analysis would rival "*War and Peace*" in length. Your servant will offer, instead, examples and responses that would typify those for a complete novel…, but shorter.

Ready? Let us begin.

Joe Leland

Monday, February 12, 2024 at 1:04 AM — Edit

Author – "Moreover, all of the other "dozen recent lower court judges" the commenter references did not rule on the nbC status of Obama. Instead, the challenges to his claimed nbC status were virtually always dismissed for lack of "standing" in the challengers."

Here is a list of court decisions that decided Obama's eligibility based on his being a natural born citizen (first two pages).

https://tesibria.typepad.com/whats_your_evidence/BIRTHER%20STRING%20CITE.pdf

https://www.thepostemail.com/2024/02/09/the-ussc-oral-arguments-in-trump-v-anderson/

Commenter Leland challenges several of your humble servant's assertions. Candidly, the document linked in his comment of 2/12/24 at 1:04 AM from "tesibria.typepad.com" is a

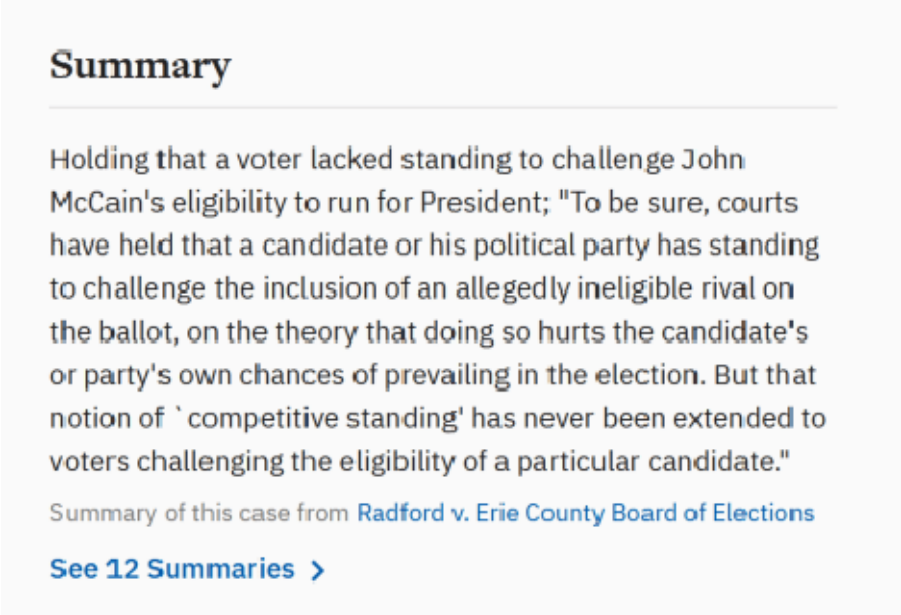
useful compendium of assorted lower trial court cases, administrative rulings and "grand jury presentments" relating to Barack Hussein Obama's purported natural born Citizen ("nbC") eligibility and seemingly offered in support of the commenter's arguments. Faithful *P&E* readers are encouraged to sample the list. Your servant appreciates the list as well, as it catalogues the opposition ammunition pile, at least as of 2012.

Although apparently not updated since 2012, it still contains hundreds of old citations to assorted determinations and cases…, ummm, problematically…, ***not one*** of which includes reference or citation to a decision of the U.S. Supreme Court ("USSC") directly addressing and confirming that Barack Hussein Obama, Jr. was, is, or in the future will be a "natural born Citizen" under the Constitution's Eligibility Clause, Art. 2, § 1, Cl. 5. Not… one. And please, the intellectually flawed and *obiter dictum* littered majority decision in *United States v. Wong Kim Ark* ("*WKA*") is ***not*** the "one," as hereafter discussed.

As a prefatory observation, it is posited that there are two competing theories as to what the Founders in 1787 understood the nbC term to mean. Those two theories are (1) only a person born in a country to two parents who were ***already*** citizens of that country, the "de Vattel § 212" definition, or (2) any person who is a "citizen at birth" or a "citizen by birth" without the need for later formal naturalization and ***regardless*** of place of birth and/or parental citizenship.

Although tempting, your servant has neither the time nor the inclination to burrow through each of the listed "tesibria.typepad.com" citations to analyze, distinguish or dissect individual examples. Moreover, it is presumed that *P&E* readers similarly do not have the time (or inclination) to tackle a "*War and Peace*" dissertation on the nbC issue.

On the other hand, perhaps discussion and brief analysis of a few of the cases included in the list and purporting to ratify the "citizen-at/by-birth" theory of nbC status will explain why, in the absence of a binding USSC decision articulating the Founders' 1787 understanding of the definition of the term, all of the other cases are meaningless chaff, floating through the air and serving little purpose other than to baffle and confuse those seeking the truth.



https://casetext.com/case/hollander-v-mccain

As but one example cited in the list offered by Mr. Leland in support of an nbC definition purporting to declare Sen. John McCain to have been constitutionally eligible to the presidency, the list (seemingly supported by the commenter) cites "*Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008) (dismissing case challenging McCain's eligibility)." Memo to the commenter and all others reading this post: the case was dismissed for lack of litigant standing and ***not*** as the result of the court's rejection of the claim that McCain was constitutionally-ineligible as lacking nbC bona fides.

Indeed, at the very beginning of the opinion (566 F. Supp. 2d at 65), the court clearly and unambiguously states: "Based on the arguments presented there [at a July 24, 2008 hearing on a motion to dismiss], as well as in the parties' briefing, the court rules that Hollander lacks standing to bring this action. The 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)

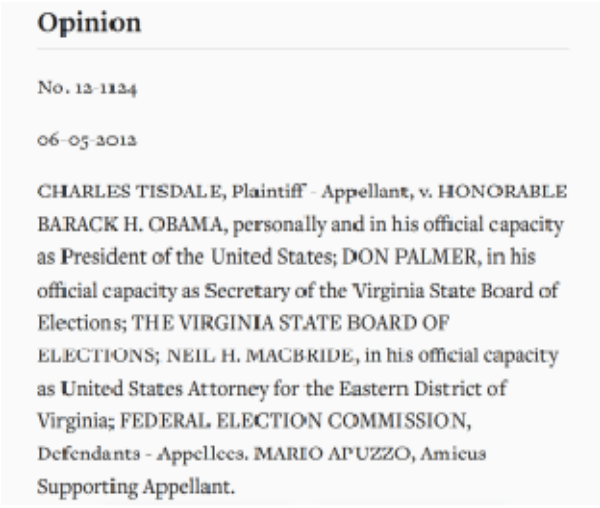
Accordingly, any claim that *Hollander* constitutes useful or binding nbC precedent is, to use polite terminology…, misplaced. Woefully and deceptively misplaced.

Conceptually, the vast majority of the other cases on the tesibria.typepad.com list rest on the same legal foundation: dismissal for lack of "standing" rather than agreement on a particular definition of an nbC or dismissal based on a misapprehension of the "holding" in *Hollander*, as was the case in *Tisdale v. Obama*.

That case is also on the commenter's "approved" list of "controlling" cases. Significantly, the Fourth Circuit *per curiam* affirmation of the District Court's dismissal of the plaintiff's challenge in *Tisdale* (for failure to state a claim) announces that it is an ***unpublished, non-precedential ruling.*** Memo to file: a "non-precedential" ruling is not

properly labeled (or marketed) as being binding on anyone other than the parties to the case.

In the *Tisdale* District Court ruling, we find the following: "The Court rules that the Complaint does not state a claim upon which relief may be granted. The eligibility requirements to be President of the United States are such that the individual must be a 'natural born citizen' of the United States and at least thirty-five years of age [*and*, ***omitted*** *from the list by the court, at least 14 years a resident of the nation*]. U.S. Const. art. II, § 1.



Opinion

No. 12-1124

06-05-2012

CHARLES TISDALE, Plaintiff - Appellant, v. HONORABLE BARACK H. OBAMA, personally and in his official capacity as President of the United States; DON PALMER, in his official capacity as Secretary of the Virginia State Board of Elections; THE VIRGINIA STATE BOARD OF ELECTIONS; NEIL H. MACBRIDE, in his official capacity as United States Attorney for the Eastern District of Virginia; FEDERAL ELECTION COMMISSION, Defendants - Appellees. MARIO APUZZO, Amicus Supporting Appellant.

https://casetext.com/case/tisdale-v-obama

"It is well[-]settled that those born in the United States are considered natural born citizens. *See, e.g.*, *United States v. Ark*, 169 U.S. 649, 702, 18 S.Ct. 456, 42 L.Ed. 890 (1898) [*sic: the court* ***misidentifies*** *the respondent*] ('Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States.'); *Perkis v. Elg*, 99 F.2d 408, 409 (1938) (*sic: the court* ***misidentifies*** *the plaintiff*). Moreover, 'those born "in the United States, and subject to the jurisdiction thereof,"… have been considered American citizens under American law in effect since the time of the founding … and ***thus*** eligible for the presidency.'" [citing] *Hollander v. McCain*, 566 F.Supp.2d 63, 66 (D.N.H.2008)." (Emphasis added)

The sloppiness of the lower court *Tisdale* decision regarding its typos and mis-citations casts doubt over its precedential value. Carelessness in details often also indicates carelessness in logic. And the District Court's conclusion that a 14th Amendment "citizen" is "***thus*** eligible for [*sic*: to?] the presidency" – and ***specifically*** citing *Hollander* in support of that conclusory and unfounded claim – is absurd. Once again…, this…, time…, more…, slowly: the *Hollander* court clearly stated that it was ***not*** reaching the nbC issue with regard to Senator McCain. Full stop.

Finally, one other case cited in the list in support of the "citizen at/by birth" theory to be preferred over the de Vattel § 212 nbC definition – a person born in a country to two parents who are already citizens of that country – is, of course, *WKA*.

> The author of the *WKA* majority opinion, Justice Horace Gray (appointed to the Court by the Nation's First Usurper-in-Chief, Republican Chester A. Arthur) – intentionally or not – fundamentally misstated the history of two of the first enactments of the Congress in reaching his ultimate conclusion that Wong Kim Ark was a "citizen" under the 14th Amendment. Here is why.
>
> *https://www.thepostemail.com/2021/01/22/in-the-same-words/*

While your servant has frequently critiqued that decision, including the manifest "in the same words" error committed by Justice Gray addressed here, Justice Gray cites among other cases in support of his otherwise flawed majority opinion the decision of Supreme Court Justice Noah Swayne (sitting in circuit) in *U.S. v. Rhodes*, 27 F.Cas. 785 (1866).

Justice Gray cites with seeming approval the following statement from Justice Swayne in the *Rhodes* case (27 F.Cas. at 789): "All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. ***There are two exceptions, and only two, to the universality of its application.*** The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, ***and slaves, in legal contemplation, are property, and not persons. 2 Kent, Comm. 1; Calvin's Case, 7 Coke, 1; 1 Bl. Comm. 366; Lynch v. Clarke, 1 Sand. Ch. 583.***" (Emphasis added)

Apart from omitting the ***third*** (*i.e.*, more than "two") universally-recognized exception – children born to parents of a hostile occupying force – Justice Gray seems nonplussed at citing favorably the *Rhodes* decision, even ***after*** the 1868 ratification of the 14th Amendment, which decision characterizes "slaves, in legal contemplation…, [as] property, and not persons." Bad form, especially after 1868.

Justice Swayne might be excused for the comment, since the 14th Amendment was not yet in existence in 1866. But Justice Gray's reliance on *Rhodes* in WKA, decided in 1898, thirty years after ratification of the 14th Amendment, without articulating disapproval of Justice Swayne's "slaves are property, and not persons" claim, is an unfortunate omission, particularly for a Supreme Court Justice.

Further adumbration (look it up) of the nbC topic here in a response to comments offering *obiter dictum* as precedent, flawed case law decisions and unsupported allegations would be pointless. The commenter believes what he wants to believe, and no volume of contrary empirical evidence will likely change his mind. Moreover, the same might be said for many "de Vattel-Deniers" in academia, the mainstream media and, of course, the Congressional Research Service, which touts itself to be the repository of "the nation's best thinking." Spare me.

Swiss philosopher, lawyer and jurist Emmerich de Vattel published "The Law of Nations" in 1758 (public domain)

But your servant still awaits an answer from the commenter…, or anyone else: why would the Founders have intentionally adopted a ***lower*** "citizen-at/by-birth" nbC definition barrier to the potential for foreign influence in the presidency when a known and available ***higher*** barrier – the de Vattel § 212 barrier – existed, particularly 81 years ***before*** ratification of the 14th Amendment?

The answer – clear to some, but obscure to others – is simple: they wouldn't. And they didn't.