“Native-born” ≠ “Natural-born”

by Joseph DeMaio, ©2022

Emmerich de Vattel (public domain)

(Mar. 1, 2022) — From time to time, your humble servant’s P&E postings generate comments deserving response. On most occasions, the responses are posted in the same place. When a longer, more comprehensive response is indicated, a separate post is offered. Such is the case with the following response to the comments of Mr. Becker found here.

As a prefatory “head’s up,” the following discussion focuses on the perennial issue of presidential (and vice-presidential) eligibility as a “natural-born Citizen” under Art. 2, § 1, Cl. 5 of the Constitution. I know…, I know…, you’re probably saying: “Good Lord, not *again!* Will no one rid The P&E of this meddlesome DeMaio eligibility-denier?”

If that is your mindset or if you’ve “heard this all before,” you should go back to what you were doing before reading this far. On the other hand, if you wish to hear “the rest of the story,” read on. Rest assured, the only reason the matter resurfaces now is that misinformation, allowed to stand unexamined and unchallenged – even in response to an editorial – often metastasizes into something mistaken for the truth.

Bear in mind, faithful P&E readers, that the referenced P&E “Are You Happy Now?” post from which the Becker comment and this response blossoms addressed primarily whether those who voted for “Let’s Go Brandon” in 2020 are happy now. It did ***not*** focus on the “natural born Citizen” eligibility question or the related “citizen grandfather clause” exception. As background, the citizen grandfather clause allowed, as a time-constrained exception to the Constitution’s “natural born Citizen” restriction, persons who were U.S. native-born or by law naturalized to be eligible to the presidency.

That said, Mr. Becker (and many others) are seemingly quite happy now…, some likely even giddy over the gift to Afghan Taliban hyenas of billions in military equipment and a huge functioning airbase; $6.00/gal. gasoline; and rates of inflation not seen for 40 years. The term "comatose" comes to mind.

But I digress.

Instead of focusing on answering the question posed, Mr. Becker (and others) again pounced on the tangential discussion in the post questioning the constitutional *bona fides* of Kamala Harris. Harris was mentioned, of course, because if the Goofball were to be impeached or otherwise removed from office, unless the Supreme Court interceded – an ***extremely*** unlikely scenario – she would become the president, albeit one with questionable qualifications.

What did the Framers mean by the term "natural born Citizen"?

The commenters came to her defense, as well as to the defense of the man many believe was the first usurper of the presidency, Chester A. Arthur and, of course, the Second Usurper in Chief ("SUC"), Barack Hussein Obama, Jr. In addition to discounting the importance of the citizen grandfather clause in Art. 2, § 1, Cl. 5, discussed here, central to Mr. Becker's defense was the claim that the Founders believed that the terms "native born and natural born meant the same thing."

Really? Let us examine that assertion.

As discussed here, Kamala Harris may well be ineligible because although she was born in Oakland, California, and thus under existing law a "citizen" and/or a "native-born citizen," neither of her parents were U.S. citizens at that time.

Those facts, in turn, raise serious questions as to whether she is a "natural born Citizen" as contemplated by the Founders when viewed against the backdrop of § 212 of Emmerich de Vattel's tome, *The Law of Nations*. An 18th Century Swiss philosopher and jurist, Emmerich de Vattel has been acknowledged by the U.S. Supreme Court as being "the international jurist ***most widely cited in the first 50 years after the Revolution*** *[i.e., between 1776 and 1826]*. 1 J. Kent, Commentaries on American Law 18 (1826)." *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n. 12 (1977).

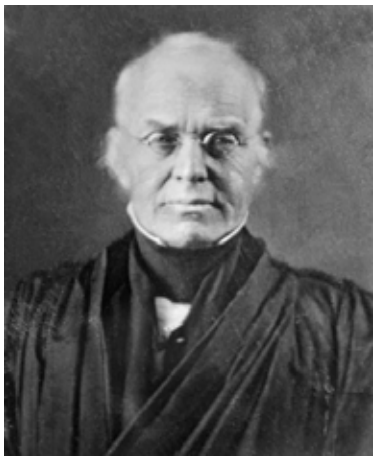
This acknowledgment from the decision is important because it also confirms that for the "50 years after the Revolution," – including when the Constitution was being drafted, signed and ratified – de Vattel's treatise was "continually in the hands of the members of our Congress now sitting…," quoting Founder Benjamin Franklin. *Id.* The Court has recently reaffirmed that de Vattel was "the founding era's ***foremost expert on the law of nations…***" (Emphasis added). *See Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 496 (2019).

Moreover, insofar as presidential eligibility is concerned, it is a topic which remains unresolved by the U.S. Supreme Court or a ratified constitutional amendment. A denial of a petition for a writ of certiorari is not a decision on the merits. And please, spare me the references to *Ankeny v. Governor of the State of Indiana* and the article by law professors Paul Clement and Neal Katyal, "On the Meaning of 'Natural-Born Citizen.'"

Mr. Becker claims that "as to the Founders, native born and natural born meant the same thing." If that were documented as true (it is not), there would have been no need for inclusion of the citizen grandfather clause in Art. 2, § 1, Cl. 5 of the Constitution ***at all***. And the fact that by lapse of time, the citizen grandfather clause is no longer operative does not mean that its original inclusion in the Constitution no longer sheds light on the original intent of the Founders.

Additionally, any reliance by the commenter on the writings of St. George Tucker in purported support of the assertion that the Founders deemed the two terms as interchangeable – recalling that although St. George Tucker was a lawyer, he was ***not*** one of the Founding Fathers signing the Constitution – is misplaced. This is because St. George Tucker misquotes the Constitution in his analysis and Mr. Becker repeats the misquotation in his comment.

Specifically, St. George Tucker substitutes the term "native born" – extracted from his own cranium – for the actual language used by the Founders, *i.e.,*: "natural born." This substituted alteration is not unlike the ellipsis chicanery practiced by the Congressional Research Service in its series of memoranda and reports on the presidential eligibility issue, discussed here, here and here.



U.S. Supreme Court Associate Justice Joseph Story (public domain)

On the other hand, Mr. Becker's earlier citation to § 1473 of Supreme Court Justice Joseph Story's "Commentaries on the Constitution" accurately quotes the Constitution's actual language, *i.e.*, that "[n]o person except a *natural-born Citizen*" (emphasis added) shall be eligible to the presidency, subject to the citizen grandfather clause exception.

Furthermore, Becker's quote from Justice Story's analysis of the citizen grandfather clause as impacting presidential eligibility itself undercuts the claim that the two terms mean the same thing. Justice Story states in § 1473: "This permission of a ***naturalized*** citizen to become president [*i.e.*, the citizen grandfather clause] is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties." (Emphasis added)

A "naturalized citizen" is neither a "native-born citizen" nor a "natural-born citizen." A naturalized citizen is the product of legal proceedings; a native-born citizen or a natural-born citizen is a result of birth in the nation, but not any legal proceeding. And while all natural born citizens are also native born citizens, not all native born citizens are natural born citizens. Think Venn diagrams.

As to the natural-born citizen, that category requires, in addition to birth in the nation, citizenship in the nation by ***both*** parents of the person born at the time of birth. This is the core principle of § 212 of Emmerich de Vattel's treatise and as recognized by the Supreme Court in *Minor v. Happersett*, 88 U.S. 162 (1875), *abrogated by the 19th Amendment* (1920). Kamala Harris cannot claim that her parents were U.S. citizens when she was born, because they were not.

Justice Story correctly recognized that the citizen grandfather clause created qualified, temporary eligibility by way of allowing, as a time-limited exception to the natural born Citizen requirement, a *naturalized* citizen to be president. After the time restriction expired, no naturalized United States citizen could thereafter be president. *See Schneider v. Rusk*, 377 U.S. 163, 165 (1964) ("We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity, and are coextensive. The only difference drawn by the Constitution is that *only the 'natural born' citizen is eligible to be President*. Art. II, § 1." (Emphasis added)

Had the Founders intended that a "native-born" citizen could be eligible, they would have said so. They did not. Indeed, they said just the opposite. A "Citizen of the United States at the time of the Adoption of this Constitution" is not the same as a "natural born Citizen."

Portrait of St. George Tucker, Charles Balthazar Julien Févret de Saint-Mémin, public domain (US copyright law)

If Mr. Becker's reliance on Justice Story is valid, then those who were citizens in 1789 – when the Constitution was finally adopted upon ratification by the requisite number of states – were *naturalized* citizens, neither native-born nor natural-born. Were the contrary true, as claimed by the commenter, the existing language of the Constitution, crafted by the Founders rather than by St. George Tucker, would have been mere surplusage. It is not.

In summary, Justice Story reinforces the conclusion that even the Founders realized that there was a distinction between a "citizen" – whether denominated a "naturalized citizen" or a "native born citizen" – and a "natural born Citizen." Again, if there were no distinction between or among these differing classes of citizens, then there would have been no need for the citizen grandfather clause at all.

Finally, Justice Story's additional observation in § 1473 that the intent of the Founders was to "cut off ***all*** chances for ambitious foreigners…" (emphasis added) to insinuate themselves into the office of the presidency simply cannot be squared with the theory that, instead, they intended only to cut off "some" chances or even "half of the chances" of such attempts by adopting an interpretation of the eligibility clause allowing one or the other – but not both – of the parents of a child claiming "natural born Citizen" status to suffice.

Accordingly, and for all of the foregoing reasons, it is your humble servant's view that Mr. Becker's assertion that the Founders considered the terms "native-born" and "natural-born" as being synonymous within the language and meaning of Art. 2, § 1, Cl. 5 of the Constitution is, respectfully, wrong.