Natural Born Citizens and USSC Docket 20-1503

WHO IS -- AND IS NOT -- A "NATURAL BORN CITIZEN"?

by Joseph DeMaio, ©2021

On July 25, 1787, John Jay wrote to George Washington, "Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in chief of the American army shall not be given to, nor devolved on, any but a natural born Citizen."

(May 16, 2021) — When, in the course of human events, it becomes necessary for your humble servant to respond to comments in greater detail than allowed in the designated section of P&E posts, a longer post is required. Such is the case with this offering regarding assertions made by those who reject the likely application of Book I, Ch. 19, § 212 of Emmerich de Vattel's 1758 treatise, *"Le Droit des Gens"* or *"The Law of Nations*," to the proper interpretation of Art. 2, § 1, Cl. 5 of the Constitution, the "natural born Citizen" restriction for the presidency. Here we go again.

Valued P&E readers, that which follows is somewhat convoluted, but given that the issues are less than simple, a more complex explanation is necessitated. Translation (more on that topic later…): keep some of your favorite caffeinated beverages handy. Your humble servant has his can of Dr Pepper nearby. In addition, it is assumed that readers are already possessed of some historical background relating to the issues, since complete treatment of all the interstices of the matter would make this offering *much* longer. For that, see all of your servant's prior P&E posts on the topic.

Ready? Let us begin.

In response to this post addressing what a hypothetical *amicus curiae* brief in the "Laity v. Harris" matter now pending in the U.S. Supreme Court might look like, several commenters have pointed out various "errors" and purported anomalies in the article. The substantive, as opposed to tertiary (has the CRS been contacted?) comments have been chiefly directed at the assertion that in the 1760 London edition English translation of de Vattel's tome, in §212, the French word "indigènes" was translated as "natural born citizens."

Specifically, commenter Becker asserts (comment posted May 9, 2021 at 4:50 PM) that in all editions of the English translated work prior to 1797, the word remained "indigènes" and did not appear as the "natural born citizens" English translation until the 1797 London edition. That comment is correct, at least when referencing the London and Dublin editions, noted in the same comment. However, the record is unclear as to whether *other* editions from *other* translators making the "natural born citizen" translation existed prior to July 25, 1787, the date of John Jay's "hint" letter to George Washington. For purposes of the following discussion, however, that uncertainty is immaterial.

Regardless, the veiled suggestion is made that, because when John Jay composed his "hint" letter to General Washington in 1787, no edition of the Vattel tome translated the French word "indigènes" as "natural born citizens," Jay could not have relied on the treatise when he used that very term in his letter to General Washington. Whether Jay relied on other translations is unknown.

LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
Nihil est enim illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia coetusque hominum jure sociati, quæ Civitates appellantur. CICER. Somn. Scipion.
TOME I.
A LONDRES.
M. DCC. LVIII.

"The Law of Nations" by Emmerich de Vattel

That uncertainty aside, for purposes of discussion, it will be assumed that the comment positing that the "natural born citizens" translation did not appear until the 1797 London edition is not inaccurate. It is noteworthy, however, that this same point was argued,

using essentially the same logic, in the 2011 version of the Congressional Research Service Report R42097, discussed here, and was equally unavailing there. But more on that report later.

Your humble servant confesses that the likely source for the reference to the 1760 translation as including – perhaps, but perhaps not – the words "natural born citizens" was the citation to the work found in the Wikipedia entry found here. Memo to readers (and your humble servant): exercise caution when sourcing facts to "open source" websites, *i.e.*, sites which can be edited by virtually anyone, with or without expertise or supervision.

That said, Wikipedia can be a source of useful information, as well as disinformation. In this instance, it may be both, as evidenced by footnote 1 therein, referencing the 1758 original French version of the treatise, as well as the text discussing who came into possession of copies of the original version of the tome: Founder Benjamin Franklin.

Second, the Wikipedia textual entry notes: "Swiss editor Charles W.F. Dumas sent Benjamin Franklin three original French copies of the book in the 1770s. Franklin received them May 18, June 30, and July 8 by two couriers: Alexandre Pochard (Dumas' friend and later companion to Fleury Mesplet) and a man named Vaillant. Franklin kept one copy for himself, depositing the second in 'our own public library here' (the Library Company of Philadelphia which Franklin founded in 1731) and sending the third to the 'college of Massachusetts Bay' (Franklin used the original name from 1636, not acknowledging the 1639 rename to Harvard College in honor of John Harvard). On December 9, 1775, Franklin thanked Dumas." (footnotes omitted).

This entry, if true, informs of two main points. First, it confirms that the 1758 French edition of de Vattel's treatise was in Benjamin Franklin's possession prior to John Jay's July 25, 1787 "hint" letter to George Washington. Second, and of greater significance discussed hereafter, it further informs that one copy of that tome was placed – presumably in the library – of the College of Massachusetts Bay, in 1639 to become Harvard College and later, Harvard University. Stated otherwise, it would appear that a copy of the de Vattel work, in French, was easily accessible to, for example, members of the Massachusetts Legislature.

In the original "Laity v. Harris *amicus curiae*" post reply comments, your humble servant posed the question: "If § 212 was not the source of John Jay's term 'natural born Citizen' which he used in his July 25, 1787 'hint letter' to George Washington, where did he get it?" In a Becker comment posted May 11, 2021 (2:11 P.M.), there is offered this response: "Perhaps Jay was familiar with the acts passed by the Massachusetts legislature that were passed [*sic*] before he wrote his July, 1787 letter." The comment reminds one of the fictional "Department of Redundancy Department."

Really?

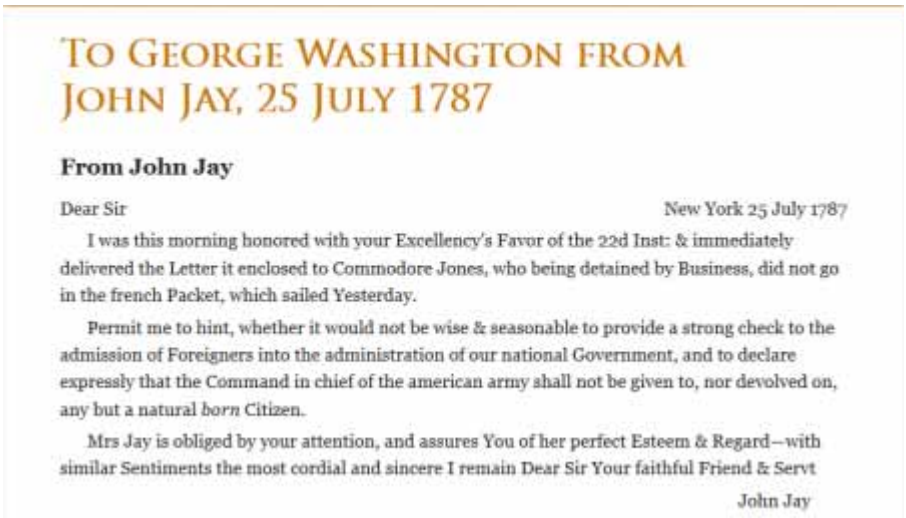
As a threshold question, why, pray tell, would John Jay – from New York and in 1787 serving as the Secretary of Foreign Affairs under the Articles of Confederation – be

"familiar" with five "special legislation" acts passed by the Massachusetts Legislature seeking to naturalize individual residents of a state other than New York?

It is equally if not more likely that Jay was already independently familiar with both the French and English editions of the de Vattel treatise and the principles of § 212 set out therein and thus relied on one or the other, or even both,for the language he used in his letter to Washington.

Those questions aside, the Becker comment lists five (5) instances where the State of Massachusetts – ummm…, rather than the yet-to-be assembled members of the Constitutional Convention – enacted laws declaring certain named individuals ("and others") to be "Citizens of this Commonwealth," sometimes calling them "natural born citizens," sometimes calling them "natural born subjects."

Interestingly, in the two instances in closest temporal proximity to Jay's "hint letter" of July 25, 1787, the Massachusetts legislative acts declare that the individuals being "naturalized" shall be "deemed, adjudged and taken to be free Citizens of this Commonwealth, and entitled to all the liberties, privileges and immunities of *natural born subjects*." (Emphasis added). Despite that anomaly, Jay used the term "natural <u>*born*</u> Citizen" (emphasis by Jay) in his letter to General Washington. Recall, faithful P&E readers, that under the U.S. Constitution – as opposed to a pre-Republic Massachusetts law – a 14th Amendment naturalized citizen is ineligible to the presidency. *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).



TO GEORGE WASHINGTON FROM JOHN JAY, 25 JULY 1787

From John Jay

Dear Sir — New York 25 July 1787

I was this morning honored with your Excellency's Favor of the 22d Inst: & immediately delivered the Letter it enclosed to Commodore Jones, who being detained by Business, did not go in the french Packet, which sailed Yesterday.

Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in chief of the american army shall not be given to, nor devolved on, any but a natural *born* Citizen.

Mrs Jay is obliged by your attention, and assures You of her perfect Esteem & Regard—with similar Sentiments the most cordial and sincere I remain Dear Sir Your faithful Friend & Servt

John Jay

Text of John Jay's letter to Gen. George Washington suggesting that only a "natural born Citizen" be allowed to serve as president and commander-in-chief of the military

Accordingly, whether the term "natural born citizens" or "natural born subjects" is at issue, the fact that all of the Massachusetts laws cited in the Becker comment were naturalization laws would have otherwise disqualified each of the newly-minted Massachusetts citizens from the presidency, even if a U.S. presidency or Supreme Court existed at that time (neither of which did).

While Massachusetts, prior to its amalgamation into the Republic as a "state," was an independent member of the original Thirteen Colonies under the Articles of Confederation – free to declare as to its residents their status *vis à vis* Massachusetts – that independent power was forfeited when it became a member of the United States governed by a single national constitution, including Art. 2, § 1, Cl. 5 of that document.

Furthermore, if as the Becker comment posits, the source for Jay's "natural born citizen" term may have stemmed from a purported familiarity with the Massachusetts naturalization acts listed in the comment, one must ask: (1) why did Jay change "natural born subjects" to "natural born citizen;" and (2) why is it not equally "possible" that the Massachusetts legislators themselves relied on § 212 for their use of the term and, despite the questionable supposition that John Jay was "familiar" with the naturalization acts of a state other than his own, conclude that is where they got the term?

In either case, the source could well have been de Vattel's treatise, either directly from Benjamin Franklin's copy or indirectly from the Massachusetts legislators' own analyses of § 212 in their naturalization acts. Stated otherwise, if the source for the "natural born citizen" term in Jay's letter was the same for John Jay – Franklin's copy – as for the Massachusetts Legislature – the copy in the College of Massachusetts Bay library – it would be, as they say, a distinction without a difference. And to reiterate, this circumstance, of course, does not even address the fact that the Massachusetts enactments were "naturalization" statutes, rather than constitutional proscriptions on eligibility to the presidency.

Bear in mind, faithful P&E readers, that the original wording of the first sentence of § 212 in French begins with the words "Les Citoyens." There is no dispute (nor can there be) that these words translate in English, and well before 1797, as "The Citizens." The words do not translate as "the subjects." The second sentence begins thusly: "Les Naturels, ou Indigènes…," suggesting clearly that a "natural" person is also an "indigenous" person.

Moreover, later in the section, the French word "parens" indisputably translates as "parents," in the plural. In 1787, as today, the term "indigenous" (and in French: "indigène") meant (and today means) "produced, growing, living, or occurring natively or ***naturally*** in a particular region or environment" (emphasis added) or "of or relating to the earliest known inhabitants of a place and especially of a place that was colonized by a now-dominant group."

Because of Jay's ancestral ties to French Huguenots and his negotiation of and signing of the Treaty of Paris, formalizing the end of the Revolutionary War, there should also be little debate over the fact that he understood not only English, but French as well. Moreover, as a "Publius" contributor to The Federalist and serving as the first U.S. Supreme Court Chief Justice, he was also rumored to be very smart.

Further to the point, the first two sentences of § 212, in French, read as follows: "Les Cityoens sont les membres de la Société Civile: Liés à cette Société par certains devoirs,

& soumis à son Autorité, il participant avec égalité à ses avantages. Les *Naturels*, ou *Indigènes*, sont ceux qui sont nés dans le pays, de Parens Citoyens."

In English, but for the term in question "indigènes," the two sentences translate thusly: "The Citizens are the members of the Civil Society: bound to this Society by certain duties and subject to its Authority, they participate equally in its advantages. The natives, or ** indigènes, ** are those [who are] born in the country of parents who are citizens."

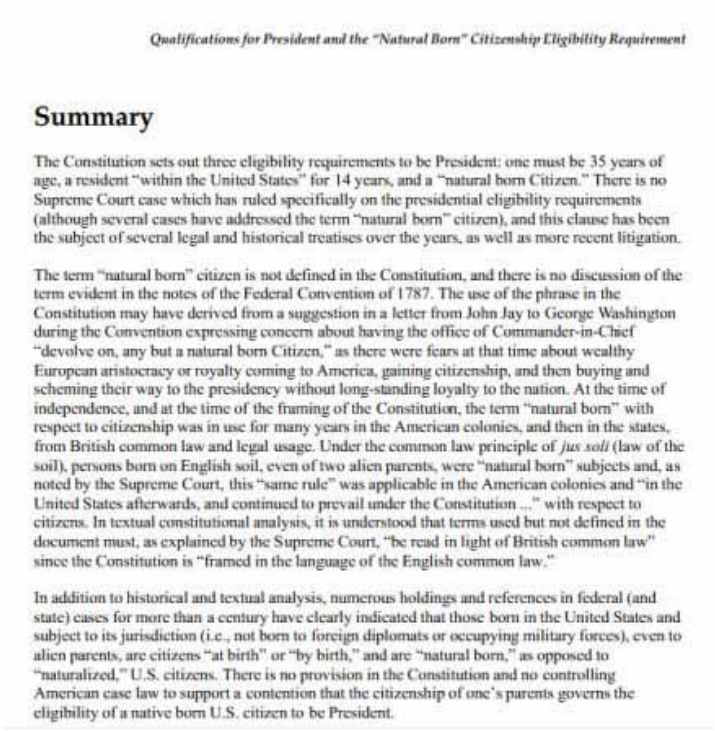
Against this backdrop, it is something less than rocket science to posit that, even if Jay possessed only an early original edition of de Vattel's treatise in French, the combination and proximity of the words "citoyens," "naturels," "indigènes" and "parens" could logically, if not inexorably, have led Jay to conclude that, under § 212 of the de Vattel tome, a person born to two citizen parents in the land to which they were indigenous members constituted a "natural born citizen."

This result would seem to be at least as viable, if not more likely, as one concocted under the theory that Jay could have been merely "familiar" with the "acts passed by the legislature of Massachusetts" before writing his 1787 letter to Washington. Furthermore, ask yourself this: would it have made any sense at all for Jay to "hint" to George Washington that the office of the president of the new Republic should be restricted to "indigènes" when the entirety of the balance of his letter was in English? Huh?

Furthermore, it is odd – and as yet unexplained – why in the various English translations of the original de Vattel tome in the 1760 London edition; in the 1787 Dublin edition; and in the 1792 Dublin edition, the translation of text from French to English is applied to every single one of the 200+ French words in § 212… *except* the word "indigènes," which remains untouched and in French. Why that singular anomaly exists in each of the pre-1797 London editions remains a mystery. Stated differently: Pourquoi?

As noted, the French to English translation of the term "indigène" results in the word "indigenous." But prior to the use of the term "indigènes," de Vattel posited that the individuals at issue were the "naturels ou indigènes." The French term "naturels" translates in English to "naturals" (translators have substituted the term "natives"), so it is logical to conclude that, even in 1787, the Founders would understand that a person who was a "natural, native or indigenous" person was one who was born in the nation to two parents who were already its citizens. This conclusion applies as well to Jay with respect to his likely thought processes on July 25, 1787.

Finally, while somewhat beyond the scope of a response to the Becker comments about Massachusetts special legislation naturalization laws – and at the risk of unnecessarily lengthening this post – a brief revisiting of the issue as addressed by the Congressional Research Service in its November 14, 2011 Report R42097 – prior to its revision and restoration of the curious and problematic "Elg ellipsis," discussed here – would be appropriate.



Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement

Summary

The Constitution sets out three eligibility requirements to be President: one must be 35 years of age, a resident "within the United States" for 14 years, and a "natural born Citizen." There is no Supreme Court case which has ruled specifically on the presidential eligibility requirements (although several cases have addressed the term "natural born" citizen), and this clause has been the subject of several legal and historical treatises over the years, as well as more recent litigation.

The term "natural born" citizen is not defined in the Constitution, and there is no discussion of the term evident in the notes of the Federal Convention of 1787. The use of the phrase in the Constitution may have derived from a suggestion in a letter from John Jay to George Washington during the Convention expressing concern about having the office of Commander-in-Chief "devolve on, any but a natural born Citizen," as there were fears at that time about wealthy European aristocracy or royalty coming to America, gaining citizenship, and then buying and scheming their way to the presidency without long-standing loyalty to the nation. At the time of independence, and at the time of the framing of the Constitution, the term "natural born" with respect to citizenship was in use for many years in the American colonies, and then in the states, from British common law and legal usage. Under the common law principle of *jus soli* (law of the soil), persons born on English soil, even of two alien parents, were "natural born" subjects and, as noted by the Supreme Court, this "same rule" was applicable in the American colonies and "in the United States afterwards, and continued to prevail under the Constitution ..." with respect to citizens. In textual constitutional analysis, it is understood that terms used but not defined in the document must, as explained by the Supreme Court, "be read in light of British common law" since the Constitution is "framed in the language of the English common law."

In addition to historical and textual analysis, numerous holdings and references in federal (and state) cases for more than a century have clearly indicated that those born in the United States and subject to its jurisdiction (i.e., not born to foreign diplomats or occupying military forces), even to alien parents, are citizens "at birth" or "by birth," and are "natural born," as opposed to "naturalized," U.S. citizens. There is no provision in the Constitution and no controlling American case law to support a contention that the citizenship of one's parents governs the eligibility of a native born U.S. citizen to be President.

November *1, 2014 memo on the subject of "natural born Citizen" by the Congressional Research Service*

In that Report, the CRS argues that the French terms "Les naturels ou indigènes" as appearing in de Vattel's original work in French could not, at least in 1787, be accurately translated as the equivalent of "natural born Citizen." The problem with the CRS analysis, however, is that it ignores the words *following* that phrase, and whether evaluated in French, English or even Mandarin.

Specifically, and without regard to what the proper English translation of "naturels" or "indigènes" may be, de Vattel explains that whatever meaning one assigns to those terms, collectively they mean "… sont ceux qui sont nés dans le pays, *de parens citoyens*…." (Emphasis added) or, in English: "are those who are born in the country, *of citizen parents*." (Emphasis added).

Stated otherwise, whether denominated a "naturel," an "indigène" or a "natural born Citizen," in order to match its antecedent, the person needed to be born in the country to parents (plural) who also were citizens. Labels and debatable nomenclature aside, that *concept* is the crux of § 212, so that, whether one is called "natural born," "indigenous" or something else, in order to qualify as such, one needs to be born in the country where *both* parents – particularly the father – are also, at the time of birth, citizens of that country.

In this regard, the CRS Report completely ignores the seventh and final sentence of § 212, which reads in French thusly: "Je dis que pour être d'un pays, il faut être né d'un père citoyen; car si vous êtes né d'un étranger, ce pays sera seulement le lieu de votre naissance, sans être votre patrie." English translation: "I say that in order to be of the country, it is necessary to be born of a citizen father; for if [you] are born there of a

foreigner, *it will be only the place of your birth, without being your country*." (Emphasis added)

Later English translations have altered the colloquial "second person" language of the original (*i.e.*, "you" and "your") to "third person" generic (*i.e.*, "one," "he" and "his"), but there is no alteration of the substantive import of the seventh and final sentence: if a person is born in a country to a father who is in that country as a foreigner, and not as a citizen, then the country is only the place of the person's birth and cannot properly be deemed to be the person's country, since the person's country, wherever that may be, is that of the foreign father, whether the father be Peruvian, Japanese, Kenyan…, or Jamaican.

If § 212 were a statute (concededly, it is not), in construing and determining the underlying intent, it would be subjected to certain rules of interpretive construction. One such rule requires that the "statute" be read as a whole, rather than as a collection of unrelated, disassociated words, in order to glean the overall intent of the drafters.

If that principle were to be applied here – an action seemingly both "foreign" as well as "alien" to the CRS – there could be little question that, quite apart from nuances in the definitions and/or translations of the terms "naturels," "indigènes" and "citoyen," the core *content* and *intent* to be gleaned from de Vattel in § 212 was to convey the principle that *only* if a person's father were already a citizen of the nation where the person was born could that person be deemed to be "of" that country. Otherwise, "…ce pays sera seulement le lieu de votre naissance, sans être votre patrie: the country will be only the place of your birth, not your country."

So, faithful P&E readers, after all the dust settles and the blogosphere smoke created by "pro-Vattel" and "con-Vattel" gladiators clears, this situation is why the Supreme Court should accept jurisdiction in "Laity v. Harris," USSC Case Docket No. 20-1503. The Court should (a) find the requisite standing in Robert Laity; (b) grant his petition for certiorari; (c) order the briefing of the issue on the merits; (d) entertain the filing of *amicus curiae* briefs; (e) set the matter for oral argument in the 2021 term beginning October 4, 2021; and (f) resolve, finally, the "natural born citizen" question which it has for many years "evaded."

There is still a fairly good chance that, once again, the Supreme Court – despite the additions of Justices Gorsuch, Kavanaugh and Barrett – will again punt and refuse to address the issue. A "*per curiam*" order stating merely "certiorari denied" is so much less grating than "issue evaded once again." Intellectual courage has never been a prerequisite for Supreme Court Justices. Just ask Chief Justice Roberts.

On the other hand, if jurisdiction is denied, perhaps Justice Thomas will take the opportunity to explain whether he (a) agrees with the denial, or (b) disagrees with the denial, maybe even explaining his reasons. Either way, it would be an improvement over the present – and recurring – situation, even if he were to come out as "pro-CRS" and "con-Vattel." Sad, but possible.

In conclusion, last night, once again your humble servant channeled Founder John Jay – ahem…, the first Chief Justice of the United States Supreme Court – and secured his view as to what he believes the proper decision in USSC Docket 20-1503 should be. He asked that your servant keep his opinion in confidence, which request will be honored. But after confirming to your servant that he keeps a copy of de Vattel's original 1758 treatise on his nightstand, you can probably guess what his position is.