

Of Occam's Razor and Natural Born Citizens, Part 1

“THE MOST STRINGENT AND IMPENETRABLE BARRIERS”

by Joseph DeMaio, ©2015



(May 12, 2015) — In science and mathematics as well as in other disciplines, including political discourse, there is a principle known as [Occam's razor](#). Reduced to its essence, it articulates the proposition that the simplest answer or explanation for a result is the one relying on the fewest assumptions. Moreover, the principle postulates that such answer or explanation will likely be the correct one.

If applied to the question of whether the Founding Fathers intended (a) to restrict eligibility to the presidency to persons born here to two parents, a father and a mother, who were at the time of birth already U.S. citizens, or (b) open up eligibility to the presidency to any Tom, Ted, Marco, Bobby, Hillary or Barack at all born here (or maybe not), whether one, both or either of the parents was a U.S. citizen and regardless of whether one, both or either of the parents were from Yemen, Argentina or Kenya and whether here legally or illegally... which one is more likely to be the correct answer?

The following refresher course “hints” that the more “wise and seasonable” answer – and more likely the correct one – is: “a.”

INTRODUCTION

In the continuing saga of who is – and who is not – eligible to serve as president under the “natural born Citizen” clause of the Constitution, Art. 2, Sec. 1, Cl. 5, it bears repeating that the U.S. Supreme Court has not – repeat, *not* – yet issued a binding decision on the point. While numerous cases have tangentially addressed the issue and/or strongly intimated a ruling on the question, none has yet directly addressed the matter in the context of a sitting president or a viable candidate to the office.

Moreover, while several lower court appellate cases have attempted to raise the issue as to the current occupier of the White House, and, ultimately, reach the Supreme Court for a decision, most have either been dismissed for lack of “standing” in the plaintiff seeking an adjudication of the matter or, even if abstract standing is recognized, denied Supreme Court review by *certiorari*. As to the denials of *certiorari*, as P&E readers well know, at least one Supreme Court Justice has articulated the view that, as to the eligibility issue as it might relate to current events, the Court “is [evading](#) that issue.”



Accordingly, since the issue persists – and in light of recent attempts to “put to rest” rumors that certain GOP presidential candidates may be, just as is the current usurper of the office, ineligible to [hold the office](#) – it is prudent periodically to revisit several salient points supporting the conclusion that the Founding Fathers intended that the term “natural born Citizen” as used by them in the Constitution meant *only* those persons who, when born, were born to two parents who were both at that time already citizens of this nation. This conclusion is consistent with the teachings of Emmerich de Vattel in his tome, “[The Law of Nations](#)” and specifically, § 212 thereof.

There, de Vattel articulates the principle of law that natural born citizens “are those born in the country, of parents who are citizens...” and that “...in order to be of the country, it

is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.”

If one looks closely enough, there are numerous empirical facts validating these principles and their impact on the Founders as they drafted and ratified their new Constitution. These facts, of course, are either ignored or trivialized by those seeking to allow anyone (other than within the diplomat or military exceptions) simply born here – Occam’s razor option “b” above – to be eligible to the presidency. That is not, empirically speaking, what the Founders intended.

So, with apologies (as usual) for the length of this post, let us begin.

THE “NO CITIZEN PARENT/ONE CITIZEN PARENT” STANDARD VS. TWO CITIZEN PARENTS STANDARD

First, as noted [here](#), it is undisputed the Founders were intent on erecting the most stringent and impenetrable barriers available to thwart the entry into the office of the presidency of foreigners and foreign influences. This objective is clearly set forth in various of the notes emanating from the constitutional convention as well as in the recognition of the dangers associated with allowing the possibility of any foreign influence to infiltrate or commandeer the office.

This concern is plainly articulated by Founding Father Alexander Hamilton in [Federalist, No. 68](#): “Nothing was more to be desired than that *every practicable obstacle* should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, *but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?*” (Emphasis added).

Clearly, the objective and desire of the Founders was not to make it merely “difficult” or “laborious” for a foreigner to access and ascend to the office. Rather, consistent with erecting “every practical obstacle” to foreign entry into the presidency, the objective was to make it virtually impossible for that to happen. To that end, a standard which requires both parents to be citizens at the time of birth – rather than one or neither to be a citizen – presents a far more fortified barrier than one that disregards the de Vattel “two citizen parents” and at minimum, “citizen father” standards, both articulated in § 212 of his treatise.

Some have argued that, after the passage of the Fourteenth Amendment (1868) and the Supreme Court decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), mere birth within this nation – regardless of the citizenship of the parents (unless the parents are military or diplomatic personnel of a foreign nation) – is “good enough” and will suffice to constitute the person a “natural born Citizen” for constitutional eligibility purposes.

Thus, under this theory, an “anchor baby” born to two alien non-citizens merely present here from another country – whether Yemen, Argentina or Kenya and whether here legally or illegally – would make the child a “natural born Citizen” eligible to serve as president. Without regard to the practical likelihood of that person being actually elected – an issue *completely* unrelated to constitutional eligibility – this cannot be what the Founders intended. Chief among the advocates for this expansive reading of the term are the lawyers at the Congressional Research Service (“CRS”) (*see, e.g.*, <http://fas.org/sgp/crs/misc/R42097.pdf>) as well as distinguished former attorneys with the Office of the United States [Solicitor General](#).

As noted by the U.S. Supreme Court in *Minor v. Happersett*, 88 U.S. 162 (1875), while there have been doubts about claims to status as a “natural born Citizen” regarding persons born to non-citizen parents, there have “never” been any doubts as to such claims with respect to persons born here to two citizen parents. *See Minor*, 88 U.S. at 167-168.



Even if that recognition by the Supreme Court be deemed non-binding “dicta” as contended by the CRS lawyers – and persuasive arguments exist that the Court’s recognition of that fact is not dicta, but instead a necessary component of the holding in the case – it is nonetheless “dicta” by the U.S. Supreme Court which clearly articulates a true, empirical fact, as noted [here](#).

Accordingly, the notion that the Founders consciously intended to design and select a *lower* standard of presidential eligibility (*e.g.*, the Yemeni anchor baby option) when a *higher* standard existed (§ 212, de Vattel) strains credibility and plainly turns the intent of the Founders regarding insulation of the presidency from foreigners and foreign influence on its head.

Indeed, under the “open borders” policies of the current regime, the CRS interpretation of the eligibility clause converts the constitutional barrier intended to be erected by the Founders into a “fast-track” lane for the precise end they sought to avoid and prevent. For this reason *alone*, the expansive theory conflating “native born citizens” with “natural born citizens” as advocated by the CRS and the former lawyers at the Solicitor General’s Office is poorly reasoned and thus, intellectually flawed.

Second, although the 2011 CRS “Report re: Qualifications for President and the ‘Natural Born’ Citizenship [*sic*] [Eligibility Requirement](#)” grudgingly cites the decision in *Minor*, it trivializes and minimizes the Court’s observation that there had “never been doubts” with regard to the status of persons born here to two citizen parents as being “natural born citizens.”

To its credit, however, the 2011 CRS Report at least does not delete from the Court’s *Minor* opinion by ellipsis omission this relevant language, contrary to its practice later in the Report (p. 45) with regard to the Court’s decision in *Perkins v. Elg*, 307 U.S. 325, 329 (1939). As detailed [here](#), that grammatical chicanery was advanced by the 2011 CRS Report as well as in a prior 2009 CRS “[Memorandum](#)” in support of the counterfeited claim that even the children of alien parents, if born here, constitute “natural born citizens.”

And while the 2011 CRS Report displays great skill in gathering “cherry-picked” anecdotal evidence that its theory, rather than the “§ 212 de Vattel theory,” better states the Founders’ intent, none of it is based on the actual writings (as opposed to transcriptions of the handwriting) of the Founders. In particular, none of the Report’s anecdotal evidence bores more deeply into what John Jay intended when he sent a July 25, 1787 letter to George Washington “hinting” that only a “natural born citizen” should be eligible to the presidency.

Indeed, the 2011 CRS Report boldly (and erroneously) asserts that as to the “§ 212 de Vattel” theory requiring two citizen parents at the time of birth for the child to qualify, at that moment, as a natural born citizen, “... there is no justification [for the two-citizen parent requirement] ... in any of the statements or writings of the framers of the Constitution...” See 2011 CRS Report at 46. Really? The CRS researchers might well have dug a bit deeper before making that assertion.

Accordingly, an examination of what John Jay meant when he used those words in his “hint” to Washington seems prudent.

JOHN JAY'S HINT



The writings of John Jay – a Founding Father, a contributor to *The Federalist* and the first Chief Justice of the United States Supreme Court – provide useful guidance. While there is apparently no specific reference to § 212 of de Vattel’s work in the notes of the Constitutional Convention or in the *Federalist*, later to become more commonly known as “*The Federalist Papers*” – a work frequently cited by the Supreme Court when seeking the Founders’ original intent – it is generally acknowledged that the origin of the suggestion that the “natural born Citizen” limitation be inserted into the draft Constitution came as a result of a July 25, 1787 letter penned by Founder John Jay to the chief presiding officer of the Constitutional Convention in Philadelphia, George Washington.

Accordingly, one additional source worthy of examination regarding what the Founders intended in using the term could lie in the contemporaneous writings of the Founders, including, for example, John Jay, Thomas Jefferson and James Madison. Jay and Madison, of course, were (along with Alexander Hamilton) the “Publius” authors of *The Federalist*.

In the [letter](#) most frequently quoted, the future first Chief Justice of the U.S. Supreme Court writes to General Washington:

“Permit me to hint, whether it would not be wise and seasonable to provide as 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 devolve on, any but a natural born Citizen.”

The original of the handwritten letter is now preserved in the Library of Congress in Washington, D.C. Specifically, in Jay’s handwriting, the word “american” is not capitalized, and the word “born” is underscored. When those words are transcribed into print, most versions capitalize the word “american,” but omit Jay’s underscoring of the

word “born.” Whether there is any significance to Jay’s underscoring of the word “born,” in turn, might be gleaned from a prior [draft](#) of the latter dated the same day, which is preserved in the Columbia University, Butler Library, Rare Book & Manuscript Division in New York City, New York.

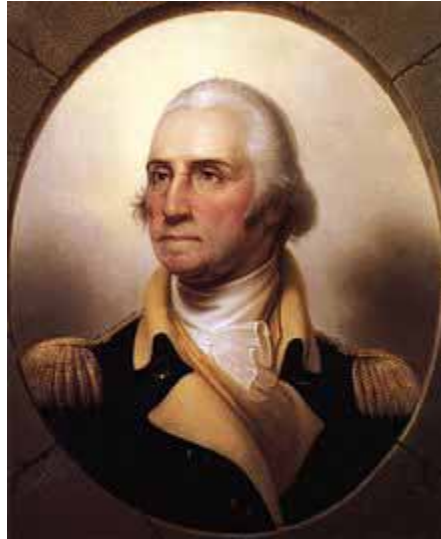
As can be seen from that image, while most of the language of the final, original Library of Congress document delivered to George Washington appears, much of it takes the form of interlineations of text following the crossing out of previously existing text. What is unknown, of course, is what the crossed-out text said before Jay substituted the language we now see.

However, the “natural born Citizen” phrase first appearing in the “Columbia” document image is exactly the same as that appearing in the final “Library of Congress” image, with one important exception: while the word “born” in the “Columbia” image is not underscored, the word “born” is underscored in the final, Library of Congress image. This small difference merits further examination.

On the one hand, it might be argued that it is of no significance and that Jay simply meant to emphasize that one must be actually born here as opposed to being born elsewhere or being naturalized. On the other hand, it might be argued that he intended to emphasize the core principles embodied in § 212 of de Vattel’s work that, as stated there, in order for one to be a natural *born* citizen, one must be *born* in the country to “parents who are citizens” and/or, at minimum, born to a father who is, at the time of birth, already a citizen. Otherwise – as further specifically noted by de Vattel in the last sentence of § 212 – the country will be only the place of the child’s birth and not the child’s country.

Thus, it is clear that under the de Vattel approach, a more restrictive definition of “natural born Citizen” – requiring both parents to already be citizens when the child is born – prevails over the less restrictive definition advocated by the 2009 and 2011 CRS documents. So the question becomes: would John Jay have favored a *more* restrictive or a *less* restrictive barrier to the entry into the presidency of foreigners and foreign influence? Moreover, would that preference have manifested itself in his selection of the words “natural born citizen” in his “hint?” The historical evidence suggests, clearly, that Jay would have selected the more restrictive option over the more liberal option.

In support of this conclusion, it should be noted that after George Washington submitted Jay’s “hint” to the participants at the Constitutional Convention in Philadelphia, the actual language we now see in Art. 2, Sec. 1, Cl. 5 appeared and was approved by the convention delegates for final inclusion.



Thereafter, however, as the Constitutional Convention was nearing its end, on July 25, 1788 – exactly one year following his “hint” to George Washington – John Jay personally proposed an additional amendment to the “natural born Citizen” requirement which would have *further* narrowed the field – rather than expanded the field – of eligible natural born citizens to those who in addition were “freeholders,” *i.e.*, natural born citizens who *also* held [title](#) to land.

Specifically, the amendment Jay offered, and made a part of the ratification process by his home state of New York, proposed an amendment of the existing natural born citizen provision of the Constitution approved by the convention to provide, among other things, that presidential eligibility would be restricted to natural born citizens “who shall be [Freeholders.](#)” This amendment seems plainly to support the conclusion that John Jay, if faced with the Occam’s razor options discussed above, would choose “a” and reject “b.” Rocket science, this is not.

However, Jay’s amendment also sought to extend the natural born citizen “Freeholder” restriction to “Members of either House of the Congress of the United States.” That amendment, as we know, failed, with the delegates enacting the language of Art. 2, Sec. 1, Cl. 5 as we now see it.

The point, however, is that the genesis of the Constitution’s natural born citizen requirement – Jay’s July 25, 1787 “hint” to George Washington – originated with a Founder who favored not only the restriction on the eligibility to the presidency provided by that concept as articulated by de Vattel in § 212, but who seemingly meant to even further fortify the restriction with his “freeholder” amendment.

Some constitutional scholars have suggested that the amendment ultimately failed because it sought to extend the natural born citizen eligibility restriction to the [members](#) of the Congress. While the delegates were plainly in favor of retaining the natural born citizen restriction for the chief executive, extending the restriction to all the members of Congress may have been seen as “a bridge too far.” If Jay’s amendment had passed, it

likely would have disqualified many members of Congress, including, for example, Senator Harry Reid, both of whose parents were rumored to be Klingons. Too bad it failed.

Thus, John Jay, in suggesting to George Washington that the presidency should be restricted “only” to natural born citizens, seems clearly to have intended the more restrictive definition of that term calculated to erect a much higher bar to the entry of foreigners into the presidency – option “a” – than the lower “option ‘b’” standard deemed by the CRS and the former Solicitor General’s Office lawyers under the Constitution to be “[refreshingly clear](#).”

[Part 2 to follow shortly.]