Of Occam's Razor and Natural Born Citizens, Part II (Conclusion)

"OF SEMINAL IMPORTANCE TO THE LEADERS OF THE AMERICAN REVOLUTION"

by Joseph DeMaio, ©2015


LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
TOME I.
A LONDRES.
M. DCC. LVIII.

(May 14, 2015) — [**Editor's Note:** The following is the conclusion to the discussion begun in Part 1 of this series.]

PARLEZ-VOUS ANGLAIS?

One of the more novel yet disingenuous contrivances used in the 2011 CRS Report in the attempt to discredit and marginalize § 212 of de Vattel's tome takes the form of the contention that, when the Constitution was drafted, no English translation of the French term used by de Vattel "Les naturels ou indigenes" was available to the Founders. *See* 2011 CRS Report at 22, fn. 100. The Report then notes that, since an English translation of those words as meaning "natural born citizens" did not come until "*after*" (emphasis by CRS) the adoption of the Constitution, it concludes (erroneously) that de Vattel's words in § 212 "could not possibly have influenced the framing of the Constitution in 1797." *Id.*, fn. 101. Really?

To begin with, the CRS erroneously presumes that none of the delegates at the convention understood French. *Au contraire*: not only did many of the delegates speak

and write French as well as English – the educational system in 1787 being a bit more worldly than it is today – de Vattel's work, "The Law of Nations," in French, was well-known to the delegates to the Constitutional Convention and was frequently resorted to during their debates.

In point of fact, and as noted here, the U.S. Supreme Court has already recognized that de Vattel's treatise was of critical influence on the Founders.

As recently as 1978, in *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452, 462, n. 12, the Court noted that "the international *jurist most widely cited in the first 50 years after the Revolution [i.e., between 1776 and 1826] was Emmerich de Vattel*. 1 J. Kent, Commentaries on American Law 18 (1826). *In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of [de] Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting . . . .' 2 F. Wharton, United States Revolutionary Diplomatic Correspondence 64 (1889), cited in Weinfeld, supra, at 458.*" (Emphasis added).

Contrary to the flimsy myth peddled by the 2011 CRS Report that none of the Founders could possibly have been influenced by de Vattel's tome because of language barriers, it is clear that the treatise, including § 212 thereof, was well-known to the Founders. In fact, it has been authoritatively noted that "Emmerich de Vattel was *by far* the most influential of the continental publicists [authorities relied upon by the Founders based on their treatises which claimed to state what the law was as deduced from principles of natural law]." (Emphasis added) *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 404 (2012).

Professor Reinstein notes: "The Law of Nations was of *seminal importance* to the leaders of the American Revolution because it animated pre-revolutionary thought that is at the core of the Declaration of Independence" (emphasis added), citing David Armitage, "*The Declaration of Independence: A Global History*, 38-44 (2007) for the proposition that "[n]o other treatise on international law *came close to being as widely read or as heavily relied upon by the Revolution's leaders*." *Id*. (Emphasis added).

Emmerich de Vattel

Professor Reinstein continues, (*id.*): "The impact of his treatise [The Law of Nations] in Europe and the United States *was extraordinary*: '[de] Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in decrees and correspondence of executive officials. *It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration*…,'" (emphasis added), quoting Charles G. Fenwick, "*The Authority of Vattel*," 7 Am. Pol. Sci. Rev. 395 (1913).

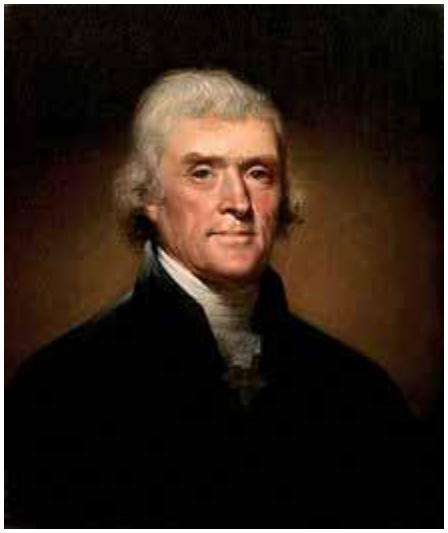
Professor Reinstein then adds, *id.*, "[Alexander] Hamilton and [Thomas] Jefferson each considered [de] Vattel as *authoritative and inspirational*. According to Forrest McDonald [an American author and historian recognized as one of the foremost authorities on the history of the U.S. Constitution and the early years of the American Republic, [de] Vattel was one of the three philosophers/statesmen who had *the greatest effect on Hamilton's thinking*." (Emphasis added).

And that James Madison, another Founder, was also familiar with and relied upon de Vattel and/or The Law of Nations is confirmed through an examination of various letters he wrote to Thomas Jefferson (May 8, 1793), John Jay (draft letter of October 17, 1780 citing de Vattel for principles relating to innocent passage on the Mississippi River) and James Monroe (November 27, 1784) relating to the arrest and extradition of alien offenders.

Moreover, since Hamilton, along with John Jay and James Madison, were the three "Publius" authors of The Federalist, the potential for them discussing *all* aspects of the new Constitution – including the principles articulated by de Vattel with regard to who could and who could not be, under natural law, eligible to the presidency as a "natural born citizen" or a "naturel ou indigene" – is not only highly likely, it is a virtually inescapable conclusion.

In fact, the collection of historical documents from the era is replete with examples of correspondence between and among numerous of the Founders and their contemporaries where de Vattel and/or his treatise, The Law of Nations, is cited and discussed (and, in the case of Jefferson, cited and discussed in the same document in both French and English. *See*, *e.g.*, Thomas Jefferson May 29, 1792 letter to George Hammond.)

Jefferson also cited and discussed de Vattel's work in letters to James Madison on April 28, 1793 and August 3, 1793 as well as in reports to President George Washington on March 22, 1792 and April 28, 1793.



And in a letter by Thomas Jefferson to John Jay dated November 14, 1788, Jefferson emphasizes with respect to the appointment of counsels to France the importance of appointing only "native citizens" as opposed to "aliens" or "citizens alien-born." The reasons given by Jefferson for this restriction included, specifically, the fact that they are "more to be relied on in point of fidelity." (Emphasis added). It is noteworthy that, even under the 2011 CRS Report's analysis of the language used by de Vattel in § 212, the French terminology was "naturels ou indigenes" and only later translated to "natives or indigenes." See 2011 CRS Report at 22, fn. 100.

Against this factual backdrop – one ignored, of course, by the result-oriented 2011 CRS Report – it strains, if not shatters, credulity to contend that the principles and ideas articulated by de Vattel, including the rational and logical principles set forth in § 212 of The Law of Nations "… could not possibly have influenced the framing of the Constitution in 1787…" as claimed in the Report. It is impossible, on the one hand, to reconcile the 2011 CRS Report's assertion that de Vattel's teachings were irrelevant to the Founders' intent, debates and deliberations with, on the other hand, the recognition that his work was, as Professor Reinstein notes, "of *seminal importance* to the leaders of the American Revolution." (Emphasis added).

Indeed, not only does empirical evidence abound from the historical documents of Jay, Jefferson, Hamilton, Madison and Franklin that de Vattel's ideas and theses did, in fact,

"influence[] the framing of the Constitution…," any objective analysis of the issue demonstrates that de Vattel's tome actually *guided* the Founders in their efforts to design a governing document for their new nation. The principles articulated by de Vattel in § 212 of his treatise must thus be seen as the *sine qua non* of what their intent was in designing and enacting Art. 2, Sec. 1, Cl. 5 of the Constitution.

WHERE DID JAY GET HIS LANGUAGE?

Moreover, if as the 2011 CRS Report contends (at 42, fn. 101), the only English translations of § 212 available *before* the adoption of the Constitution translated the French words "Les naturels ou indigenes" as "natives or indigenes," and that since it was much later (1789, 1833 and 1837) that translations of the Constitution – significantly, *from* English *to* French – indulged in the "creative translation" of these words into "natural born citizen" and which purportedly "could not possibly have influenced the framing of the Constitution in 1787…" (*id.*), then – respectfully – where does the CRS Report identify the source for the specific words John Jay used – "natural born citizen" for his "hint" to George Washington on July 25, 1787?

Jay most certainly could not have resorted to Blackstone's "Commentaries on the Law of England"), which the 2011 CRS Report claims to have been the guiding star for the Founders. The reason for this is that, throughout *all* four volumes of Blackstone's work – covering 114 chapters on all aspects of the laws of England, including the nature of the relationship between England and people born in England – there is not a *single instance* of the use of the term "natural born citizen." Instead, the different term "natural born *subject*" (emphasis added) is used.

While it is true that, in *dictum* (side discussions of a court not constituting part of its decisional "holding"), the Supreme Court in *Wong Kim Ark* discussed various inferior court decisions where the term "natural born subject" was equated to "natural born citizen," those comments had nothing to do with the narrow question presented. The question presented in the case, and the only one answered, was whether a person born in San Francisco to two Chinese parents who at the time were not U.S. citizens was himself

a "citizen" under the Fourteenth Amendment. The Court (with two Justices dissenting) concluded in the affirmative.

In fact, as noted here, that all of the Court's discussion of other courts' discussions about "natural-born subjects" and the purported equivalency of the terms "subject" and "citizen" is non-binding "… dicta, pure and simple…" is confirmed here: Charles Gordon, "*Who can be President of the United States: The Unresolved Enigma*," 28 Maryland Law Review 1, 19 (1968). Mr. Gordon was at the time he authored the article the General Counsel at the U.S. Immigration and Naturalization Service and Adjunct Professor of Law at the Georgetown University Law Center. Mr. Gordon emphasizes: "[T]he majority's opinion [in *Wong Kim Ark*] *did not discuss the presidential qualification [sic: eligibility] clause and is not necessarily relevant to its interpretation*, except possibly by inference. (fn. 138)." *Id.* (Emphasis added).

Respectfully, the issue of who does and who does not qualify as a natural born citizen under the Constitution should not be determined by either inference or dictum. The American Revolutionary War was fought against Great Britain in order to forever *sever* any "subject/liege" relationship theretofore existing between the people of the new nation and the shackles of royalty previously existing. Accordingly, to contend that Jay or, for that matter, *any* of the other Founders purportedly would have chosen Blackstone's "natural born subject" terminology over de Vattel's "Les naturels ou indigenes" term when seeking to insulate the presidency from foreign influence is, to state the matter politely, nonsense.

Instead, the most logical answer as to the source where John Jay looked for the words to articulate his "hint" to George Washington – and the one totally escaping the author of the 2011 CRS Report – is § 212 of de Vattel, whether in the original French or in then-available English translation. Simply stated, on July 25, 1787, John Jay suggested to George Washington that it would be "wise and seasonable" to erect a barrier to foreign influence in the presidency to require that *only* a "natural born citizen," and whether called a "naturel" or an "indigene," would be eligible.

Since both Jay and Washington, as well as the convention delegates, were well aware of the existence of de Vattel's treatise, and all relied upon it in framing the Constitution, it is absurd to contend that they were oblivious to his work and, more specifically, that they had no idea what they were saying when they mandated that only a "natural born citizen" as defined by de Vattel would be constitutionally eligible to serve as president.

It is even more absurd to contend that the Founders meant to conflate the concept of a "natural born citizen" with that of an "anchor baby" insofar as eligibility to the presidency was concerned. Despite the contrary arguments advanced as "settled truth" by the Congressional Research Service and "refreshingly clear" by the Harvard Law Review Journal, that is what § 212 teaches; it is what John Jay intended; and it is what the Founders adopted into the Constitution.

§ 212 MUST BE READ AS A WHOLE

The crux of the debate, of course, boils down to what de Vattel means when he articulates the principles of natural born citizens in § 212 of his treatise. It should be noted that the treatise consists of four volumes or "Books," each addressing different and/or related areas of natural law. If § 212 were a statute enacted by a legislature and signed into law by a governing executive, there would be a number of rules or canons of statutory construction which might be applied to discern what the underlying intent of the words might be. Granted, while § 212 is not a statute, still, the principles applicable to statutory construction may prove useful in this instance.

One of the core principles of such an analysis is that the statute (or, as here, § 212) should be construed and interpreted as a whole rather than as merely a collection of unrelated, independent words, in order that the overall intent of the drafter of the statute (or, as here, de Vattel) might be better identified. In addition, separate but related statutes (or, as here, separate sections of the treatise) should be read together and harmonized in order to ascertain overall intent of the drafters (here, de Vattel).

The problem with the 2011 CRS Report and its "analysis" of § 212 is that it fixates only on the narrow question of whether de Vattel sought to articulate as a part of his thesis regarding what constituted a "natural born citizen" that both the father and the mother of a child born to them "in" the country was required. The CRS Report notes derisively that de Vattel nowhere expressly states that there is a two-parent requirement to constitute a child a "natural born citizen." *See* 2011 CRS Report at 24, fn. 109. While de Vattel may not have "expressly stated" the two-citizen parent principle, it is not exactly rocket science to understand that such is what he meant, particularly when *all* the subsequent language of § 212 – as well as other related subsequent sections of the treatise – are examined.

First, in the final sentence of § 212, de Vattel pointedly notes, as stated above, 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." Significantly, de Vattel in this sentence states the principle in the singular, *i.e.*, "*a* person" rather than in the plural, *i.e.*, "persons." He also refers to the one parent whose nature will control the child's nationality or citizenship, *i.e.*, the "father." Thus, it should be clear to anyone capable of reading plain English (or, in 1787, French) that, at minimum, the phrase "Les naturels ou indigenes font ceux qui font nés dans le pays, de Parens Citoyens" contemplates two, not one, parent as being necessary to satisfy the criterion.

Second, and equally clear through examination of the rest of the language of § 212, is the conclusion that even if the mother of the child, as the only member of the parental unit biologically capable of giving birth be not a citizen, if the father is a citizen, then a plausible but flawed argument exists for deeming the child to qualify as a "natural born citizen." However, the obverse cannot be true if the last sentence of § 212 is to retain any meaning. Unless the *father* of the child is already a citizen of the country where the mother gives birth – regardless of the mother's citizenship – the child *cannot* be a "natural born citizen."

This is the consistent principle articulated by de Vattel throughout his treatise. He states in § 213 (addressing "Inhabitants"): "… inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country…" and '…[t]heir children follow the condition of their *fathers*…." (Emphasis added). He repeats in § 215 (addressing "Children of citizens born in a foreign country"): "By the law of nature alone, children follow the condition of their *fathers*, and enter into all their rights [citing] (§ 212)." (Emphasis added). He adds in § 216 (addressing "Children born at sea"): "[If a child] is born on the open sea, there is no reason to make a distinction between them and those who are born in the country; for, naturally, *it is our extraction, not the place of our birth, that gives us rights…*"

(Emphasis added). He notes in § 218 (addressing "Settlements"): "The natural or *original settlement* is that which we acquire by birth, *in the place where our father has his*." (Emphasis added).

And in § 220 (addressing "Whether a person may quit his country") he confirms: "The children are bound by the natural ties to the society in which they were born; they are under an obligation to show themselves grateful *for the protection it has afforded their fathers*, and in great measure are indebted to it for their birth and education. They ought, therefore, to love it, as we have already shown (§ 122), to express a just gratitude to it, and requite its services as far as possible, by serving it in turn. *We have observed above (§ 212), that they have a right to enter into the society of which their fathers were members."* (Emphasis added).

When § 212 is read in its totality as a whole, and when its principles are viewed against the backdrop of the other sections of the treatise above-noted, there can be little rational doubt that Jay understood de Vattel to be stating that, in order for a child to be recognized as a "natural born citizen," both of the child's parents – and at minimum, the child's father – had to be at the time of birth already a citizen of the country where the birth took place. It is that simple.

CONCLUSION

The historical documents and the empirical evidence all point in the same direction: when presented with the choice between erecting (a) a higher barrier to the entry of foreign influence into the presidency, or (b) a lower "gateway" to the entry of foreign influence into the office, which one would have made more sense to the Founders? The higher barrier is articulated by de Vattel; the "gateway" path is advocated by the CRS and the Harvard Law Review Journal. Again, rocket science, this is not.

Short of an amendment to the Constitution removing the "natural born citizen" eligibility requirement, as many "open borders" advocates have suggested, only the U.S. Supreme Court can resolve this debate. The only decision coming close to answering the question

– *Minor v. Happersett* – is trivialized and marginalized by those who seek to "reverse engineer" a result.

And yet the decision confirms the fact that, insofar as the Founders were concerned, while there had been doubts about the citizenship status of persons born to parents who were not already citizens, there had *never* been any such doubts as to the "natural born citizen" status of a person born to two citizen parents. Stated otherwise, the Founders may be seen to have taken the "better safe than sorry" track. Too bad the voters did not realize that in 2008.

Stay tuned, because as the gloves come off in the upcoming run for the presidency in 2016, do not be surprised if some of the candidates experience a sudden "epiphany" depending on who the ultimately-nominated candidates are and "discover" that, in fact, the Constitution's eligibility clause does, in fact, matter. We have already had one usurper, so what is the harm in having another?

To repeat that which has been frequently stated here in the past: sad.