Of Presidential Eligibility, Doubling Down and Linguistic Torts, Part 2

"IT IS NECESSARY THAT A PERSON BE BORN OF A FATHER WHO IS A CITIZEN…"

by Joseph DeMaio, ©2012

John Jay became the first U.S. Supreme Court Chief Justice. In 1787, he wrote a letter to Gen. George Washington recommending that no one except a "natural born Citizen" be eligible for the presidency

(Feb. 22, 2012) — **[Editor's Note:** The following is a continuation of Mr. DeMaio's essay published at The Post & Email on February 20, 2012 discussing the third CRS memo produced by the Congressional Research Service on November 14, 2011 which attempts to "prove" that Barack Hussein Obama is eligible for the presidency based solely on his alleged birth in Hawaii and disregarding his non-U.S.-citizen father. Here, DeMaio provides an in-depth analysis of Emmerich de Vattel's The Law of Nations and its influence on the Founders in regard to their inclusion of the "natural born Citizen" clause in Article II, Section 1, clause 5 of the U.S. Constitution.**]**

DeMaio refers to the November 14, 2011 CRS memo as the "CRSR."

De Vattel's *The Law of Nations*, § 212

Residing at the core of the debate is the proper interpretation of § 212 of Emmerich de Vattel's tome *The Law of Nations.* First published in 1758 in French (Page 190 – page 191, and first translated into English in 1760, that section states (in English) as follows:

§ 212. Of the citizens and natives.

"The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, *of parents who are citizens***.** As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, *those children naturally follow the condition of their fathers, and succeed to all their rights*. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. *The country of the fathers is therefore that of the children*; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, 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*." (Emphasis added).

The CRSR dismisses *in toto* even the potential that this provision of de Vattel's tome had anything to do at all with the Founders' intent in placing into the Constitution the "natural born Citizen" eligibility requirement. The report makes much ado over the fact that, at the time of the Constitutional Convention in 1787, there was, purportedly, no French word or phrase equating with "natural born Citizen" and that therefore, the Founders, in using the term, must have meant to adopt the analogous term "natural born subject" from the English "common law." The CRSR argues that the French terms "Les naturels ou indegenes" 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 CRSR analysis, however, is that it ignores the words *following* that phrase, and whether evaluated in French or in English.

Specifically, and without regard to what the proper translation of "naturels" or "indigenes" 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…." or, in English: "are those who are born in the country, of citizen parents." Stated otherwise, whether denominated a "naturel," an "indigene," a "natural born Citizen" or a parrot, the entity at issue – in order to match its antecedent – needed to be born in the country to parents who also were citizens. Disputable nomenclature and labels aside, that ***concept*** is the crux of § 212, so that, whether one is called "natural born," "indigenous" or some other term, in order to qualify as such, one needed to be born in the country where the parents were also, at the time of birth, citizens.

In addition, the CRSR 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 pere citoyen; car si vous y êtes né d'un étranger, ce pays sera seulement le lieu de votre naissance, sans être votre patrie." 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."

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… or Kenyan.

If § 212 were a statute (and 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 Congressional Research Service – there could be little question that, quite apart from nuances in the definitions and/or translations of such of the terms "naturels," "indigenes" "citoyen" and "natural born citizen," 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 a citizen of the nation where the person was born at the time of birth 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."

Moreover, while the CRSR seeks to make the case that England's "common law," as articulated by Sir William Blackstone, must be the prime, if not exclusive, foundation for examination of the meaning and intent of the Founders and to the exclusion of de Vattel, any objective examination of the *entire* backdrop of circumstances extant when the Constitution was being drafted must allow for the operation of de Vattel's teachings.

In this regard, the CRSR's constant drumbeat that only the "common law" in existence at the time was relied upon by the Founders is rebutted by the very words of one of the Founders, George Mason: "We have it in our power to secure our liberties and happiness on the most unshaken, firm, and permanent basis. We can establish what government we please. But by that paper we are consolidating the United States into one great government, and trusting to constructive security. *You will find no such thing in the English government. The common law of England is not the common law of these states.*" (Emphasis added). This quote comes from the constitutional ratification debates of June 19, 1788 in Virginia.

Since George Mason was one of Virginia's delegates to the Philadelphia Constitutional Convention and is generally recognized, along with James Madison, as being one of the

prime forces behind the Bill of Rights, he is also generally regarded as properly among those known as the "Founding Fathers." His comments in the Virginia debates, therefore, can hardly be ignored. And yet, on this point, the CRSR says nothing. However, as later discussed, assuming, for the sake of argument, that certain elements of the "common law" of England did, in fact, have influence on the Founders, it is most curious that the CRSR completely ignores Blackstone's discussion of another aspect of the "common law" establishing the Best Evidence Rule. More on that issue, *post.*

Finally, in dismissing de Vattel's influence on the Founders, the CRSR frequently cites to a 1921 Yale Law Journal article, *"Dual Nationality and Election*," 30 Yale Law Journal 535 (April, 1921), authored by the then-Assistant Solicitor of the U.S. Department of State, Richard W. Flournoy, Jr. The CRSR relies heavily upon the first of the two-part article for its discussions of the differences and interrelationships between the doctrines of "*jus soli*" (law of the soil) and "*jus sanguinis*" (law of bloodline). Mr. Flournoy also discusses, much to the pleasure of the CRSR, the circumstance that much (if not the entirety) of the "common law" of England formed the basis for principles of American law. To this extent, the CRSR finds tangential support in the *first* part of Mr. Flournoy's article. However, oddly, the CRSR avoids any reference at all to the second part of the article, 30 Yale Law Journal 693 (May, 1921).

Specifically, at the end of Part 1, Mr. Flournoy states: "(To be concluded in May)." While there are many additional matters discussed in the concluding "Part 2" of the article (30 Yale Law Journal 693, "*Dual Nationality and Election,"* May, 1921), perhaps one of the reasons the CRSR does not venture into that part of the article is because of its *favorable* discussion of the work of one… Emmerich de Vattel in his tome, *The Law of Nations.*

In particular, Mr. Flournoy addresses the issue of dual citizenship and the problems it creates and states (30 Yale Law Journal at 706): "The solution of the problem of dual nationality advocated by a number of the leading authorities on international law is simply the adoption by all countries of a single uniform rule for determining *native citizenship, such rule to be based upon the principle of jus sanguinis. Vattel favored this principle, with a very important qualification.* 'By the law of nature,' he declared [fn. 91], '*children follow the condition of their fathers*, and enter into all their rights; *the place of birth produces no change in this particular*, and cannot, of itself, furnish any reason for taking from a child what nature has given him; I say 'of -itself,' for civil or political laws may, for particular reasons, ordain otherwise. But I suppose that the father not has entirely quitted his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become a member of another society, at least as a perpetual inhabitant; and his children will be members of it also.'" (Emphasis added).

The footnote referenced in the Flournoy quote above (fn. 91) is to § 215 of de Vattel's *Law of Nations*, which in turn articulates the same principle of § 212 of that work, that is, that the "children follow the condition of the father." Since elsewhere, the CRSR consistently tries to marginalize de Vattel's work as being akin to a "philosophical treatise" rather than a serious legal work and characterizes persons who read de Vattel as "enthusiasts," as if they were fans of a mystic, it is understandable that the CRSR would

not want readers to know that one of the primary sources upon which it relies – Mr. Flournoy's article – references and cites de Vattel *favorably* with regard to resolving difficult questions involving citizenship and how nations deal with these issues.

Interestingly, in the foregoing quote of de Vattel set out in the second installment of the Flournoy article (30 Yale Law Journal at 706), the 1833 Chitty translation of § 215 of de Vattel's work, and taken from the French, is replicated. But there appears in the Chitty translation of that quote an additional reference missing from the Flournoy quote. The missing language takes the form of a parenthetical reference after the language "children follow the condition of their fathers…." The reference is specifically to § 212 of de Vattel's prior explanation of the importance of parental citizenship in distinguishing between a child born of such citizen parents – the "natural born citizen" – and a child born of alien parents, which children are "native born citizens."

The important point to remember, however, and one ignored in the CRSR, is that Mr. Flournoy in his article recognizes the efficacy of de Vattel's teachings, unlike the approach taken by the CRSR, *i.e.*, to dismiss and trivialize de Vattel's work as having no bearing or relevance to the proper analysis of the question presented. But unless one reads beyond the first part of Mr. Flournoy's article and examines the second part, one would be unaware that Mr. Flournoy speaks well of de Vattel. One might even call him a de Vattel "enthusiast" on the points noted.

Thus, § 212 of de Vattel's *Law of Nations* cannot properly be dismissed as immaterial to the analysis. In this regard, the CRSR is plainly wrong.

John Jay's Letter to George Washington

Both sides on this debate seem to agree that the idea of including within the newly-drafted Constitution an eligibility standard for the highest officer, the president, originated in a letter sent by one of the Founders, John Jay, to General George Washington on July 25, 1787. A model of brevity, the entirety of the letter states: "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 [A]merican army shall not be given to, nor devolve on, any but a natural born Citizen." *See* CRSR at 6, n. 31. In a response letter to Jay from Washington dated September 2, 1787, the "hint" is acknowledged. *See* CRSR at 6, n. 32.

Against this historical factual backdrop, it seems reasonable to assume that if the concern of the Founders was to facilitate and foster as much as possible, if not guarantee, unquestioned and undivided allegiance to the new nation and to erect as effective a practical barrier to the entry into the presidency of foreigners as possible, then their preference logically would be for a higher, rather than a lower, standard of executive eligibility. Stated otherwise, and labels aside, it would make sense that the higher standard articulated by de Vattel – requiring parental United States citizenship for persons born here to claim status as a "natural born citizen" – rather than the lower

standard of being merely a "native born citizen" regardless of the person's parental citizenship, would have been the preference of the Founders.

Moreover, since the debates and discussions during the Constitutional Convention produced no *verbatim* transcripts, but were recorded largely only through "notes" taken by many of the participants, it is not altogether beyond the realm of possibility that the *concepts* of parental citizenship as being central to the determination of who would, and who would not, be properly deemed to be a natural born citizen, would be foremost in the Founders' minds, original French or contemporaneous English translations of de Vattel's work notwithstanding.

For example, the CRSR makes specific note that English translations of de Vattel's *Law of Nations* were not even available to the Founders at the time of the drafting of the Constitution, so the translation of the French "naturels ou indigenes" into "natural born Citizen" "… could not possibly have influenced the framing of the Constitution in 1787." *See* CRSR at 22. This bold observation ignores three salient facts.

First, it is well known that many of the Founders were fluent in French and many of them referred to and used de Vattel's work in the tasks associated with the drafting of the Constitution. The dismissive assumption of the CRSR that none of the Founders could possibly have understood either the French words used by de Vattel or, more importantly, the *concept* embodied in § 212 that in order for a person to be "of" the country, the person must be born as well to parents "of" the country and that, at minimum, the person's father must be "of" the country, is lamentable. Yet the palpable disdain for de Vattel in the CRSR is seemingly "par for the course" when the Congressional Research Service is involved.

Second, even the U.S. Supreme Court has recognized that de Vattel's tome was of critical influence on the Founding Fathers, stating, for example, that "[t]he international jurist *most widely cited in the first 50 years after the Revolution 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 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)…" (Emphasis added). *See U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n. 12 (1978).

Third, Madison's notes document that various delegates at the Constitutional Convention in 1787, in order to express their positions on certain matters and reference what others had written on the points, cited many other authorities, including de Vattel. If, as the CRSR seeks to show, the delegates could not possibly have known what de Vattel meant by the French terms "naturels" or "indigenes" in § 212, or what the underlying "concept" of that section was, how is it that they could have understood other de Vattel passages read aloud to them during the debates? In this regard, the CRSR may be seen as favoring "selective amnesia."

Accordingly, since de Vattel, rather than Blackstone, seems to have been the preferred "go to" authority in matters of this nature between 1776 and 1826 – the "50 years after the Revolution" above noted – the notion peddled by the CRSR that de Vattel's teachings should be marginalized and disregarded is, with respect, nonsense. Moreover, the disingenuous attempt by the CRSR to dismiss de Vattel's work, including his articulation of the definition of "natural born citizen" in § 212, as being a source which, purportedly, "could not possibly have influenced the framing of the Constitution in 1787" is, at minimum, misleading. If the Supreme Court's reference to de Vattel's important work and influence on the Founders, via *Kent's Commentaries on American Law,* is to be ignored, that action should come in a Supreme Court decision, not a CRS "product."

Returning, therefore, to the Founders' presumed concerns over the standards of eligibility to be engrafted into their new Constitution following John Jay's letter to Washington, it has been observed that the addition of the higher eligibility requirement, *i.e.*, that the president would need to be a "natural born citizen," represented "… a *sharp departure* from the Committee of Detail's recommendation, made on August 22, [1787; *see* Madison's Notes, August 22, 1787:], that the president merely be 'a citizen of the United States.' *See* "*Constitutional Qualifications to be President*," Michael Nelson, *Presidential Studies Quarterly* Vol. 17, No. 2, at 396 (1987).

It must be noted as well that, from Madison's August 22, 1787 Notes on the Debates in the Federal Convention of 1787, the Committee of Detail had also recommended that the period of residency for the president would be set at twenty-one years, a period of time fully one-third again as long as the fourteen-year residency requirement finally inserted into the Constitution. At that time, the term "citizen of the United States" had the same meaning as that which would later come to be known as the "native born citizen" or merely a "citizen" under the words of the 14th Amendment.

Against this backdrop, plainly, the Founders had in mind something more than being a mere "citizen" regarding presidential eligibility. Indeed, perceiving the need for a so-called "grandfather clause" to ensure that persons alive at the adoption of the Constitution in 1787 would not be automatically ineligible to the office (George Washington, for example, being a "natural born subject" of England), the Founders allowed for the temporary "grandfathering" standard of being merely "a citizen of the United States" until someone would emerge in the future meeting the higher "natural born Citizen" eligibility standard, thus supplanting the lower, "citizen" or "native born citizen" standard later recognized under the 14th Amendment. History shows that such a person, born in the United States to citizen parents after 1787, was Martin Van Buren, generally recognized as the first "natural born Citizen" president.

Based on these facts, originating with Jay's letter to Washington and the sentiment embodied in it, the most reasonable conclusion to be drawn is that the Founders may have seen a lowering of the residency standard to be required for presidential eligibility as being the "trade-off" for the higher standard of citizenship eligibility in terms of a citizen who also had parents who themselves were citizens. It is the concept – a person whose parents are also citizens, rather than the label "natural born Citizen" attached to the concept – which might well have motivated them. Nothing in the various notes of

scriveners at the Constitutional Convention, including the detailed notes of James Madison, would seem to contradict such a possibility.

Clearly, the Founders knew that they wanted, at minimum, a president who would also be a citizen. Otherwise, unacceptable impediments to clear and undivided allegiance to the new nation would be invited. By addressing the allegiance issue through adopting as a "sharp departure" from a lower eligibility standard for one who was merely a "citizen" the higher standard of a citizen whose parents were also citizens, their objectives would otherwise be met, allowing them to consider lowering the criterion for residency from 21 years to but two-thirds of that, or 14 years.

Such an interpretation would no doubt be rejected as untenable by those supporting the CRSR's "anyone-who-is-born-here-can-be-president" approach. The CRSR's viewpoint is so subjectively "contemporary" and "politically correct" as well as compatible with a "living, breathing Constitution," it naturally poses the inferential question: "How could *anyone*, other than a 'birther', doubt the Founders' intent on the point?" Nonetheless, the interpretation suggested above, recognizing the influence of § 212 of de Vattel's *Law of Nations*, is one which is not only possible against the backdrop of Jay's letter to Washington, it makes empirical sense.

Moreover, while it may be argued that status as a natural born citizen from de Vattel's perspective – physically born in the geographic limits of the United States to parents who at the time of birth are themselves U.S. citizens – cannot be deemed an infallible proxy for allegiance and fidelity to the nation, is it really logical to speculate – and worse, market as established fact – that the Founding Fathers, meeting in secret and writing on a completely clean slate the template for the future governance and survival of the United States, would in 1787, favor and select a *lower* standard for presidential eligibility when a known, *higher* standard was available to them?

To reiterate, the Supreme Court, through reference to Kent's *Commentaries on American Law*, has recognized de Vattel as being "… the international *jurist* most widely *cited in the first 50 years after the Revolution." (Emphasis added). It would thus appear that (1) James Kent and the U.S. Supreme Court deem de Vattel to be a "jurist" of high repute as opposed to a mere "philosopher" with a crowd of "enthusiasts" in tow, as suggested in the CRSR and (2) since the adoption of the Constitution took place in 1787, a mere 11 years after the "Revolution" and well within the "first 50 years after the Revolution," it seems safe to assume that de Vattel, his teachings and the concepts emanating from those teachings may have been far more prevalent at the Philadelphia Constitutional Convention in 1787 than the CRSR would wish one to believe.*

And besides, James Kent's work addresses American law; William Blackstone's word addresses English common law. Given that a Revolutionary War had been fought by the Americans against the British, which exposition would appear more likely to have been favored by the Founders in 1787?