Presidential Eligibility and Senate Resolution 511 (2008)

"A STATUTE…CANNOT AMEND THE CONSTITUTION"

by Joseph DeMaio, ©2018

S. RES. 511

RESOLUTION

Recognizing that John Sidney McCain, III, is a natural born citizen.

Whereas the Constitution of the United States requires that, to be eligible for the office of the President, a person must be a "natural born Citizen" of the United States;

Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the

(May 11, 2018) — It always pays to read *The P&E* daily for updates on the presidential eligibility issue. Proof of that reality – including for yours truly – comes as a result of reading some of the comments which have recently been posted regarding this P&E article suggesting questions which an independent special counsel might hypothetically pose to former presidential usurper Barack Hussein Obama, Jr. The questions, of course, would include addressing his claimed (but counterfeit) *bona fides* as a purported "natural born citizen" under the Constitution.

Despite the incessant drumbeat from leftist Obot apparatchiks and the mainstream media (forgive the redundancy), the presidential eligibility issue is neither "resolved" nor "settled" as to the guy who claims to have been born in Hawaii. Nor has the issue been resolved with regard to a long list of other individuals who are rumored to be flirting with a run for the presidency, including Messrs. Cruz and Rubio as well as Mss. Haley and Harris.

Specifically, one Alexander Gofen recently posted a comment to the above-cited *P&E* article referencing "2008 Senate Resolution 511" and its attempt to legitimize the eligibility of one John McCain as a "natural born citizen" when he was running for president in 2008. In that comment, Mr. Gofen notes, among other things, that the resolution purported to acknowledge in one of its several "Whereas" introductory clauses that a "natural born citizen" under the Constitution corresponds (as to John McCain) to a person "born to citizen parents on American soil." The comment also asserts that this criterion corresponds to that articulated in § 212 of Emmerich de Vattel's tome, *The Law of Nations.*

This got your faithful servant thinking: what does S. Res. 511 (2008) actually say? Does the Gofen comment accurately reflect the actual language of the resolution? Full disclosure/confession: your servant had not, until now, actually read the language of the resolution, despite having pontificated at *The P&E* over the years on the presidential eligibility issue under Art. 2, § 1, Cl. 5 of the Constitution. My bad.

The first step, of course, is to review the actual language of the resolution, which can be found here. The resolution was submitted by Senator Claire McCaskill (D. Mo.), but she was joined in submitting it to the Senate Judiciary Committee on April 10, 2008 by Senators Patrick Leahy (D. Vt.), Tom Coburn (R. Ok.), James Webb (D. Va.) and – interestingly – Hillary Clinton (D. N.Y.) and Barack Hussein Obama, Jr. (D. Ill.). Five Democrats and one Republican… interesting…, no? The Judiciary Committee, through Senator Leahy, reported the resolution out, without amendment, on April 24, 2008. The resolution was adopted by unanimous consent by the full Senate on April 30, 2008.

Second, on a more technical level, a congressional resolution is merely an expression of congressional sentiment or opinion. It is neither a binding law – since it is not presented to the President for "signing into law" – nor can it be deemed to be a mechanism to amend the Constitution. For a description of the differences between "soft law" (congressional resolutions) and "hard law" (statutes signed by the President), *see, e.g.*, "*Soft Law: Lessons from Congressional Practice*," 61 Stan. L. Rev. 573 (2008).

Moreover, a "whereas" clause is defined as a "recital" or "an account or description of *some fact or thing*…." (Emphasis added). Black's Law Dictionary (10th Ed. 2014). Such a recital of "fact," however, cannot create an irrebuttable presumption as to the truth or veracity of the related factual assertion thereafter made. *Heiner v. Donnan*, 285 U.S. 312 (1932) (a statute which attempts to enact by legislative fiat an irrebuttable presumption that a fact exists, when in reality it does *not* exist, is an unconstitutional denial of due process).

In addition, while the factual assertions accompanying a "whereas" assertion may state empirically provable facts, they may on occasion do just the opposite. For example, if a congressional resolution were to state, "Whereas the ratio of the circumference of a circle to its diameter is 5," that statement would be obviously wrong, because the immutable and empirically verifiable mathematical ratio at issue – "pi" – would be 3.14159……., not "5." Thus, such a resolution, under Supreme Court precedent, would be not only mathematically wrong, it would be void as creating an irrebuttable presumption.

Returning to the Gofen comment, as it turns out, the comment closely – but not exactly – tracks the language of S. Res. 511 with regard to the "natural born citizen" issue. The actual language of the resolution on the point is "Whereas [John McCain] was born to American citizens on an American military base in the Panama Canal Zone in 1936…." Thus, the question becomes: does an American military base outside the geographic boundaries of the United States constitute "American soil?"

On the one hand, it can be argued that it should be "deemed" to be American "soil" because American military law governs the activities of military personnel who happen to be present there. Thus, legal "jurisdiction" over the land, being reposed in the United States, renders it American property, at least as to U.S. military citizens present there.

On the other hand, it can be argued that an American naval base such as, say, Guantanamo Bay, Cuba remains situated on Cuban soil because the base exists under a lease between Cuba and the United States. That lease, by the way, provides that Cuba will "retain sovereignty" over the leased premises in perpetuity.


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.

The publisher of "The Law of Nations" sent Benjamin Franklin three copies Vattel's work, which Franklin stated in 1775 was consulted frequently by the Congress

Since a "lease" contemplates that a "lessor" is granting possession of "his" property to a "lessee," who is permitted to occupy the property, but without "owning" it, this theory would suggest that a person born to American citizen military parents stationed at Guantanamo might not satisfy the de Vatellian § 212 definition of a "natural born Citizen." This would be particularly so if the Cuban government (some might call it a "regime") were to claim that the person was, at minimum, a dual Cuban-American citizen. Clearly, the intent of the Founders in providing the "natural born Citizen" restriction in the Constitution was to eliminate dual, shared or split citizenship allegiances in the office of the presidency. A dual citizen does not fit that template. That is another reason why the Founders chose the § 212 de Vatellian concept of a "natural born Citizen" as opposed to the neologism – "natural born citizenship" – concocted by the Congressional Research Service in its various eligibility "products" discussed here.

As for S. Res. 511 and the Panama Canal Zone, assuming, for the moment, that John McCain was born at the Coco Solo Naval Air Station military hospital in the Zone (and not, as some have suggested, at a hospital in Panama City, Panama, which is not and

never has been part of the United States), the issue is: was the military hospital located on "American soil?"

At the time of his birth (1936), the Panama Canal Zone was an unincorporated territory under the control of the United States. However, the United States Supreme Court had ruled 35 years earlier that unincorporated territories, even if under the control of the United States, are not, prior to formal action by the Congress, a part of the United States. *Downes v. Bidwell*, 182 U.S. 244 (1901). Thereafter, the Court ruled that the full spectrum of the Constitution's provisions apply only in incorporated territories of the United States, thereby excluding from that full spectrum its application in unincorporated territories. *Rassmussen v. United States*, 197 U.S. 516 (1905).

Accordingly, much like the unresolved question of Barack Hussein Obama, Jr.'s constitutional eligibility, John McCain's eligibility remains similarly clouded. While it is unlikely that Senator McCain will again run for president, others similarly-situated might. And while S. Res. 511 may have made a lot of people happy, it provides no satisfactory answers to these constitutional questions. So many issues, so little backbone in the Supreme Court to address and "resolve" them.

In this regard, the more interesting component of S. Res. 511 as to John McCain (and others who might in the future be seen as similarly-situated) lies in the abject nonsense set forth in the fourth "Whereas" clause. That clause reads as follows: "Whereas such limitations [referencing hypothetical limitations contained in the third 'whereas' clause of the resolution and purporting to ascribe to the Founders a certain intent in restricting the presidency to natural born Citizens] would be inconsistent with the purpose and intent of the 'natural born Citizen' clause of the Constitution of the United States, *as evidenced by the First Congress's [sic] own statute defining the term 'natural born Citizen.*'" (Emphasis added)

As even first-year presidential eligibility students know, the reference in the resolution is to 1 Stat. 103 (1790). These students also know that the statute did *not* "define" the term "natural born citizen," but instead purported to amend Art. 2, § 1, Cl. 5 of the Constitution by "deeming" children born "beyond sea" to U.S. citizen parents as being "considered" to be "natural born citizens." To "consider" or "deem" someone so born to American citizen parents "beyond sea" under a statute limited solely to the power of "naturalization" cannot operate to amend Art. 2, § 1, Cl. 5 of the Constitution and convert that person into something he/she is not. That would require the recognition and validation of an irrebuttable presumption.

As noted here, the 1790 Naturalization Act (1 Stat. 103) – repealed in 1795 (1 Stat. 414), yet still relied upon by many as supporting a more liberalized and relaxed standard of presidential eligibility than that set out in de Vattel's § 212 and referencing children born "beyond sea" if born to "citizen parents" and "*considered* as natural born citizens" – does not properly control the analysis.

This is because a statute dealing with the limited and statutorily-restricted congressional authority over *naturalization* cannot amend the Constitution. Only an amendment of the Constitution can amend the Constitution. A president cannot do it via "executive order." A Supreme Court opinion cannot do it, although many of the Court's opinions purport to "interpret" plain language to mean something quite different…, as, for example, calling a "penalty" a "tax" in order to "save" a "legacy" congressional enactment. Antonin Scalia's dissent in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 646-707 (2012) should tell you all you will ever need to know about the pernicious consequences of morphing plain words into different ones in order to drive and accomplish a desired result.

Returning to S. Res. 511, since the circumstances surrounding the *repeal* of the "natural born citizen" component of the 1790 statute in 1795 (1 Stat. 414) strongly suggest that Congress realized – a mere five years after enacting 1 Stat. 103 – that it could not amend the Constitution by a statute, the conclusion is fortified that only a "natural born citizen" fitting the de Vattel § 212 definition was in 1787 originally intended by the Founders.

Accordingly, the reliance by Senators McCaskill, Leahy, Coburn, Webb, Clinton and Obama in 2008 on the language of a statute *repealed* by Congress 213 years prior to the passage of S. Res. 511 gives new meaning to the term "clueless." Again, it might have made them "happy," but it failed to make them correct. Then again, we are talking here about United States Senators, so draw your own conclusions.

One final observation: it would be interesting to trace the chronology of the language of S. Res. 511 to see if the fourth "whereas" clause originated with Sen. McCaskill or whether, perhaps, it was later added on as an amendment by, say, Senator Obama, who, incidentally, was also running for president in 2008. In light of the fact that in 2008 (not to mention today), substantial questions remained as to his actual place of birth – Honolulu, Hawaii; Mombasa, Kenya; or somewhere in Indonesia – the addition of a

"whereas" clause purporting to ratify one's status as a "natural born citizen" under 1 Stat. 103, although born "beyond sea," might arguably have been thought to benefit Monsieur Obama even more than John McCain… no?

Under that theory, since no one has challenged the U.S. citizenship of Stanley Ann Dunham-Obama, under old 1 Stat. 103, the fact that he might have been born somewhere other than in the United States to a U.S. citizen mother – and thus, purportedly, a citizen "at birth" or "by birth" and, *ipso facto*, purportedly, a "natural born citizen" – would not be a disqualifier. Aside from the fact that such a scenario would, under a § 212 de Vattel analysis, be a non-starter, in fact, such a theory would dovetail nicely into the deceptive and goofy rationales of the various "products" to be later produced by the Congressional Research Service on the issue.

Hey, the gimmick might even be successfully peddled to a somnambulant Congress and judiciary. Badda bing…, badda boom. Just sayin'….