Response to Multiple Comments on the Natural Born Citizen Issue

The Backdrop

by Joseph DeMaio, ©2022

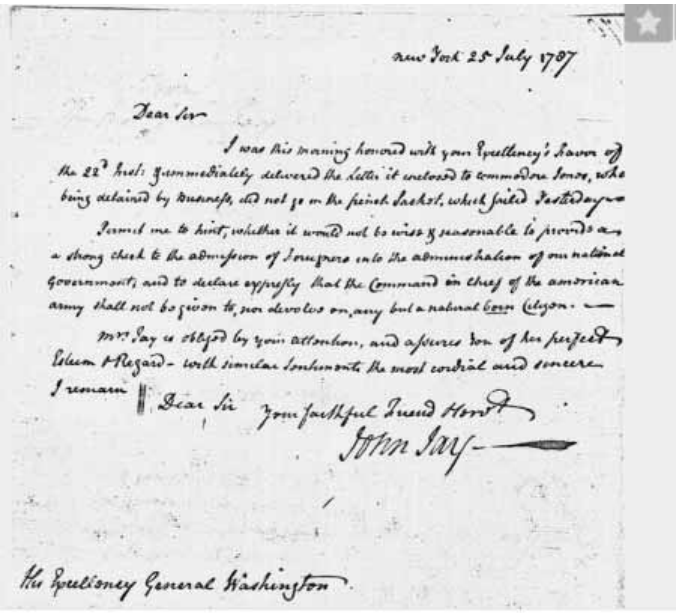
(Mar. 18, 2022) — First, let us agree to disagree, but without being rancorous. There is a big difference between an honest, if ill-informed, debate and a heated argument…., unless the latter is preferred. With apologies for the length of this offering, there are many points to cover.

Messrs. Becker, Fremick, Marshall, Polhaus and Sherman – no, Virginia, not, as far as we know, a powerhouse D.C. law firm – have all separately and independently commented and replied in opposition here, here and here to the proposition that the Founders intended that the presidency of the Republic be restricted exclusively to a "natural born Citizen" ***as that term is defined*** by Book I, § 212 of the Swiss jurist and philosopher Emmerich de Vattel's treatise, *The Law of Nations*.

As best can be discerned, and distilled to its essence, these commenters believe that the term "natural born Citizen" found in the Constitution is, and was by the Founders deemed to be, synonymous with the term "native-born citizen." This belief obtains despite the fact that unlike the term "natural born Citizen" found in Art. 2, § 1, Cl. 5, the latter term is nowhere to be found in the Constitution. Rather, it can be found only in correspondence, notes of debates and similar exchanges among persons of that era.

To the commenters, a "natural born citizen" means simply any person born in the United States and subject to its jurisdiction – thus excepting the offspring of foreign diplomatic personnel or hostile occupying forces – without reference to the U.S. citizen or foreign alien status of the person's parents at the time of birth. This is colloquially termed "birthright citizenship" and under some interpretations, even extends to persons born other than on U.S. soil if one or both parents are U.S. citizens.

Under this theory, when born here, one becomes a "citizen at birth" or a "citizen by birth," either of which is claimed to satisfy the constitutional requirement that one be a "natural born Citizen." Adherents to this theory support their position by referencing, among many others, the 14th Amendment (1868); the Supreme Court's majority opinion in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (hereinafter "*WKA*") interpreting that amendment; and the Indiana Court of Appeals decision in *Ankeny v. Governor of the State of Indiana*, 916 N.E.2d 678 (App. 2009) ("*Ankeny*").



New York 25 July 1787

Dear Sir

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

Permit me to hint, whether it would not be wise & reasonable 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. —

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 & Hble

John Jay

His Excellency General Washington.

On the other side of the debate, which includes your humble servant, the "de Vattel § 212" definition posits that a "natural born Citizen," – the term selected and used by John Jay in his July 25, 1787 "hint" letter to George Washington – is a person who is born on U.S. soil to a mother and father who at the time of the birth ***are already citizens*** of the United States.

Whether or not Jay subscribed to that definition and whether or not the Philadelphia Constitutional Convention delegates – who were in possession of the de Vattel treatise and continually consulted it as the proceedings unfolded – adopted it in crafting the Constitution remains at the core of the debate.

In support, adherents of this definition rely on, among others, the unanimous Supreme Court decision in *Minor v. Happersett*, 88 U.S. 162, noting that there had never been any doubts that a person born here to citizen parents was a "natural born citizen," but also

noting that doubts existed as to whether a similar conclusion could be reached for those born here to foreign or alien parents.

They rely as well on the verbiage used by the Founders in fashioning the "citizen grandfather clause" in Art. 2, § 1, Cl. 5, under which a "Citizen of the United States, at the time of the adoption of … [the] Constitution" would be time-limited deemed eligible to the presidency ***notwithstanding*** the fact that they became a "citizen" by operation of law (*i.e.*, naturalization via the Declaration of Independence) and ***not*** birth here.

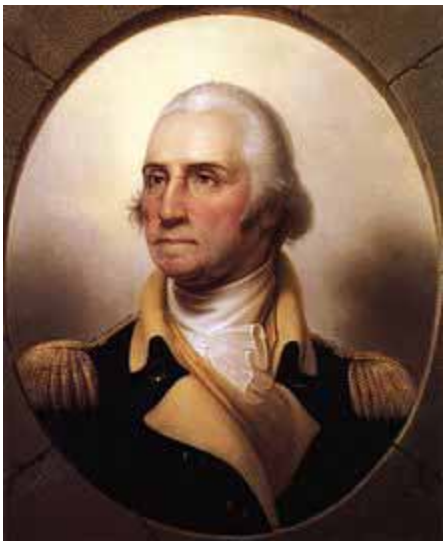
Those who reject the materiality of § 212 and its claimed influence on either John Jay or the Committee of Eleven which drafted the "Eligibility Clause" posit that in the linguistic nomenclature of 1787, the terms "native-born" and "natural-born" when referring to "citizens" were used interchangeably, as if the two were "synonyms."

Your humble servant, among others of course, disagrees: the citizen grandfather clause differentiates between the natural ***born*** status of one category of citizen and the ***naturalized*** status of those to be conditionally grandfathered as eligible. Both categories of citizens may be "eligible" to the presidency, but they are different and not "synonymous."

The Founders' use of the unmodified term "Citizen" in the "grandfather clause" – describing time-constrained individuals not meeting the additional criteria of a "natural born Citizen" under a de Vattel § 212 analysis – merely underscores the distinction drawn by them between the two categories of "citizens." Recall Humpty Dumpty's observation: "When I use a word, it means just what I choose it to mean…, neither more nor less." By equating the terms "native-born citizen" with "natural born Citizen," the *WKA*/"non-de Vattel" camp confirms the validity of Humpty Dumpty's statement.

Accordingly, to state the obvious, one camp supports the de Vattel theory as informing the Founders' intent; another camp supports rejection of the de Vattel interpretation, relying instead on the majority opinion in *WKA*. Both camps offer their supporting arguments and authorities, some of which are congruent, but most of which are diametrically in opposition.

Lamentably, because much of the actual recorded history of the meaning and import of the "Eligibility Clause" of the Constitution has vanished into history or was never recorded in the first place, much, but not all, of the information supporting one or the other of the "debating" camps' claims arises by inference, implication and indirect "circumstantial" evidence of intent. Little, if any, "smoking gun" direct evidence has yet been found, which evidence could shed helpful light on the issue.



If, for example, a letter were to be unearthed from George Washington back to John Jay after Jay's "hint" letter saying; "John, I am most humbly constrained to ask, in your 'hint' to me, by 'natural born Citizen,' do you mean as that individual is defined by Vattel?" and signed, "With best wishes for Mrs. Jay, and great affection for yourself I am – Dear Sir Yr Most Obedt Servt… Go: Washington," that would be interesting. Moreover, if Jay's response to Washington replied: "Yes, that of course is what I mean…," that would be even more interesting.

On the other hand, of equal or even greater interest would be a response from Jay saying: "Oh, no… I simply mean a native-born Citizen regardless of the citizenship status of that person's parent or parents. And who is this 'Vattel" you mention?" Alas, none of those hypothetical exchanges have surfaced, nor are they likely to emerge in the future.

But does not *WKA* "settle" the dispute? Respectfully, no, it does not. Read on…

The WKA Anomalies

1. **Justice Gray's Blunder**

The reliance placed by the "non-de Vattel" camp in the *WKA* decision is largely misplaced. Many anomalies burden the majority opinion in *WKA.* Quite apart from the fact that all of the "natural born citizen" discussion in the *WKA* majority opinion has been deemed "dicta, pure and simple…," (*See* C. Gordon, "*Who Can Be President of the United States: The Unresolved Enigma*," 28 Md. Law Rev. 1, 19 (1968)), of the major remaining anomalies, Justice Gray's obvious blunder stands out.

That blunder – erroneously asserting that Congress re-enacted in 1795 "in the same words" the "children born beyond sea are considered natural born citizens" language of the 1790 Naturalization Act – is addressed here and won't be repeated.

However, the statement of the Indiana Court of Appeals in *Ankeny* that it based its own decision on "the guidance provided by *Wong Kim Ark*…," coupled with the fact that *WKA's* discussion of the "natural born citizen" issue in a case involving only naturalization is dictum calls into serious question the substantive weight to be accorded to *Ankeny*. The flawed reasoning of *Ankeny* is discussed here and won't be repeated in this offering.

Suffice it to say that because the matter in *Ankeny* never proceeded to a trial on the merits, but was dismissed for a purported "failure to state a claim upon which relief could be granted," the court's abstract discussion of the eligibility issue is itself either dictum or, at minimum, of limited precedential weight on the federal constitutional eligibility topic, even in Indiana.

However, your humble servant is still waiting for a rational answer as to why Justice Gray's blunder does not undermine the *WKA* majority opinion's conclusion. Moreover, any claim that the blunder is not material is belied by case law decisions: if it was a careless error, such would be one thing. But if it constituted a deliberate or intentional act, that would negate any conclusion that it was a "mistake," "typo" or "blunder." Instead, it could qualify as a false statement under 18 U.S.C. § 1001.

Memo to faithful P&E readers: your humble servant is ***not*** asserting that Justice Gray consciously and/or intentionally meant to misrepresent the language of the 1790 and 1795 Naturalization Acts, 1 Stat. 103, and 1 Stat. 414, respectively. But the question presented is whether that "mistake" was (or was not) "material" to the decision.

In other contexts, the Supreme Court has held that a materially false statement has "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). Supreme Court opinions are not generally seen as being "addressed" to a decision-making body. However, in *WKA*, it could well be argued that the decision was, in fact, directed to the "United States Collector of Customs," which had denied Wong Kim Ark re-entry to the United States after a visit to China on the grounds that he was an "alien" and not a U.S. citizen.

The Supreme Court has also explained that a statement need not actually influence an agency for it to be "material" but that it need only have "a natural tendency to influence, or [be] capable of influencing" an agency function or decision. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995). "Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects." *United States v. Hansen*, 772 F.2d 940, 949 (D.C. Circuit 1985).

Thus, for example, if the *Ankeny* court came to that point in the *WKA* majority opinion where Justice Gray related that the 1795 act repeated – purportedly – the 1790 act language deeming children of U.S. citizens born abroad to be "natural born citizens," it might well have concluded it had enough "authority" to adopt the rest of the *WKA* majority's reasoning with respect to the 2012 candidacy of Sen. John McCain, who was born in Colon, Panama, not the United States. The dispute in *Ankeny* involved a challenge to the candidacies of both Barack Hussein Obama, Jr. and Senator John McCain. Such an adoption by the *Ankeny* court would thus be an independent error on its part.

2. **The "Osama bin Laden" Potential**

Another anomaly of the *WKA* majority opinion is its effect "in real time." Under *WKA* and the "native-born citizen" = "natural born Citizen" theory, if, for example, Osama bin Laden had been born in, say, Honolulu, Hawaii while his Saudi parents were vacationing there, he would have been a "natural born Citizen" eligible to the presidency.

As another example, if a foreign billionaire financier of terrorists or a foreign billionaire drug lord fathered children ultimately born in the United States, those children, regardless of the citizenship status of the mother, would be eligible to the presidency. So too if a Yemeni terrorist released from Guantanamo came illegally into Texas and fathered a child by his Iranian wife, previously transported into the nation's interior, that person would be eligible as well.

Is it logical or even rational to believe that these types of outcomes were what the Founders intended back in 1787, over 80 years before adoption of the 14th Amendment? Moreover, they likely never in their wildest nightmares anticipated that a commander-in-

chief would open the southern border to terrorists…, yet something close to that now exists.

And as for the hypothetical "drug lord" father, that too already exists. Joaquin "El Chapo" Guzman fathered – among many others – twin daughters, born in Los Angeles in 2011. Under the "birthright citizenship" protocols of the decision in the *WKA* decision, they are today U.S. citizens.

However, because the "sins of the fathers are not to be visited on the children," the fact that Guzman was of less than commendable character would not, under the majority opinion in *WKA*, change the abstract eligibility of one or the other of the twins, upon reaching age 35 and residency for 14 years, to be president. As a caveat, no negative aspersions should be drawn from the example.

The question, however, is whether these outcomes would be consistent with the original intent of the Founders as opposed to the ruminations of Justice Horace Gray and others who subscribe to the theory that parental citizenship was irrelevant and immaterial to the Founders when they inserted the Eligibility Clause into the Constitution.

3. **The Competing Claims of Allegiance Problem**

Finally, regarding the issue of "non-renounceable" allegiance, in the *WKA* case, Justice Fuller notes in his dissent (169 U.S. at 725, fn. 2) that China purported to lay claim to perpetual and ***non-renounceable allegiance*** in its citizens and offspring. He further noted that the Chinese Penal Code which would otherwise apply to Wong Kim Ark provided: "All persons renouncing their country and allegiance, or devising the means thereof, ***shall be beheaded***; and in the punishment of this offense, no distinction shall be made between principals and accessories."

The penal code goes on, but the import is clear: regardless of what the majority opinion in *WKA* held, if ever Wong Kim Ark returned to China and the authorities knew of his return, their claim of his forfeited, but non-renounceable allegiance to the Emperor of China, could have resulted in a separation of his head from his torso.

Wong Kim Ark in 1904 (public domain)

This potential, of course, did not detain Justice Gray and other members of the majority holding that Wong Kim Ark – born to Chinese citizen parents residing in San Francisco, just across the bay from Oakland, the birthplace of Kamala Harris – was under the 14th Amendment a "citizen" of the United States and "subject to the jurisdiction" thereof…, Justice Gray's prior holding to the contrary in *Elk v. Wilkins*, 112 U.S. 94 (1884) notwithstanding.

Stated otherwise, under *WKA*, the unilateral declaration by the United States that, under the 14th Amendment, any person born here and subject to the jurisdiction of the United States is a "citizen" – and under the "non-de Vattel" camp's view, also a "natural born Citizen" under Art. 2, § 1, Cl. 5 – eligible to the presidency, regardless of another nation's claim of citizenship to that same individual under its own laws.

Surely there must be an alternative. There is…, read on.

A Common Ground Answer?

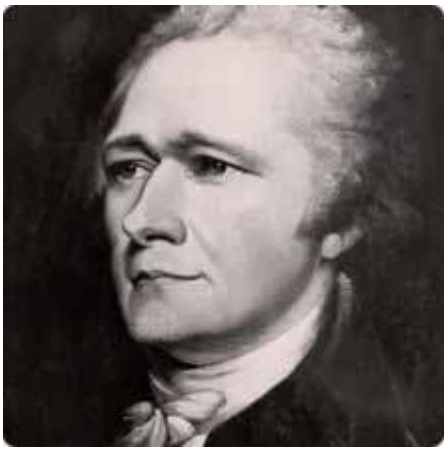
There arguably exists, however, one common ground of agreement between and among the two debating camps. That common area of agreement is that if nothing else, the Founders were united in the goal of making sure that aliens and foreigners – and in particular, persons with titles and royalty, particularly from Western Europe – would be absolutely precluded from insinuating themselves into "our councils," including the highest office of the new government, the presidency. The solution the Founders sought was the natural born Citizen constraint.

Quite apart from whether that entity was as defined by de Vattel or not, there is nearly unanimous concurrence that the potentials for "foreign influence" and "divided allegiance" were of utmost concern to the Founders, twin evils to be avoided at all costs. And divided allegiance can arise not only from the claims and actions of the birthing nation, but also from the claims and actions of other nations, including nations purporting to have non-renounceable citizen or subject allegiance laws as discussed above with regard to the *WKA* opinion.

Stated otherwise, two nations with differing citizen allegiance laws might make competing claims against the same individual, regardless of that individual's own desires and actions. Indeed, one of the core disputes between the United States and Great Britain in the War of 1812 concerned Great Britain's assertion of the right of "impressment" (*i.e.*, compulsory drafting into military service) of men claimed by that nation to still be British subjects post-1776, even those with American citizenship certificates.

Vitally concerned that the potential for "foreign influence" and "divided allegiance" needed to be ***completely*** eliminated from the office of the "Chief Magistrate" of the newly formed nation – the presidency – the Founders sought to adopt the highest available barriers to such potentials, including restricting the "command in chief" of the

American army – the president – to a "natural born Citizen" or "a Citizen of the United States at the time of the Adoption of this Constitution…."



Alexander Hamilton fought as an artilleryman in the American Revolution from the New York colony. Following the War for Independence, he became the nation's first Secretary of the Treasury. He was killed in a duel by Aaron Burr in 1804.

This goal is clearly evidenced by Alexander Hamilton in Federalist 68, where he admonished that "***every*** *practical obstacle* should be opposed to cabal, intrigue and corruption … [and that the] "… most deadly adversaries of republican government … [would come] … chiefly from the desire in *foreign powers to gain an improper ascendant in our councils*." (Emphasis added)

And while Federalist 68 was directed primarily at the wisdom of the Electoral College as the preferred mechanism over the direct "popular" election of a president, its rationale is equally applicable to the issue of restricting eligibility to the presidency ***exclusively*** to a "natural born Citizen." The question to be addressed, of course, is: did the Founders intend to linguistically equate a "natural born Citizen" with either a "native-born citizen" – a term not elsewhere appearing in the Constitution – or a "Citizen of the United States, at the time of the Adoption of this Constitution?"

Specifically, the Founders' objective was not merely to construct a simple track and field hurdle which might be cleared by people intent enough upon making the attempt. Underscoring the Founders' determination to eliminate "every" (*i.e.*, *all*) potential for divided loyalty or allegiance from the person who would be the commander-in-chief, Hamilton reiterated in Federalist 74 that "of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power *by a single hand*." (Emphasis added)

Although the context of Hamilton's words in Federalist 74 related chiefly to whether the government should be headed by a single president or by a "Chief Magistrate" tightly coupled with a council of advisors, the import of the language that the government should be guided – particularly where the military was concerned – by the "single hand" of a president ***completely*** unencumbered by divided loyalties or foreign allegiances – real or

asserted by a foreign government – is self-evident. Stated otherwise, the president must be a person possessed of and exhibiting absolute and undivided allegiance to the United States of America, and to the United States ***exclusively and alone***.

Accordingly, the issue boils down to this: if the Founders had the objective of erecting in their new Constitution a 100% impenetrable barrier – as opposed to a 50% barrier or a 75% barrier or even a 99% barrier – against the insinuation into the presidency of "foreign influence" as noted in Federalist 68 (and many others), ask yourself whether is it more likely that they would have selected a known, high barrier or a lower barrier "as to which there have been doubts?"

A high barrier would be one requiring both birth "in" the nation (*jus soli*) simultaneously coupled with the requirement that the birth be to two parents who were already its citizens (*jus sanguinis*) as known from § 212 of de Vattel's treatise and as to which barrier there have ***never*** been any doubts, as noted in *Minor*. A lower barrier would be one ***not*** requiring birth to two parents who at the time of the birth were already citizens of the nation and as to which, as noted in *Minor*, "there have been doubts."


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

One does not need a degree in rocket science to see which of the two options would present the higher barrier. And yet the Congressional Research Service, lower court (*i.e.,* non-Supreme Court) decisions (*e.g.*, *Ankeny*) and even the opinions of former U.S. Solicitor General Paul Clement and former Acting U.S. Solicitor General Neal Katyal suggest that the Founders – in 1787 –consciously intended to adopt and use the ***lower*** barrier for presidential eligibility instead of the known ***higher*** barrier. This makes no sense…, at all.

Moreover, as to John Jay's mindset, it should be remembered that he favored an even ***higher*** barrier to foreign influence in the presidency than that proposed under a de Vattel § 212 approach and in his July 25, 1787 letter to Washington.

Specifically, 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, § 1, Cl. 5 appeared and was approved by the convention delegates for final inclusion. Thereafter, however, as the ratification process among the states was proceeding, on July 26, 1788 – exactly one year and one day following his "hint" to George Washington and during the ratification process in his home state of New York – John Jay personally proposed an additional amendment.

The proposed amendment to the "natural born Citizen" requirement would have ***further*** restricted the field – rather than expanded it – of eligible natural born citizens to those who, in addition to being "natural born citizens" or "Citizens of the United States, at the time of the adoption of this Constitution…" were "freeholders," *i.e.*, otherwise eligible citizens who *also* held title to land.

This proposed amendment seems plainly to support the conclusion that John Jay, if faced with the "higher barrier" or "lower barrier" options discussed above, would have chosen the former, higher barrier. In addition, there is nothing to suggest that his mindset and intent regarding the height of barriers to foreign insinuations into the presidency were any different when he composed his hint letter to Washington one year earlier.

However, Jay's proposed amendment offered in the New York ratification process 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 settling on the language of Art. 2, § 1, Cl. 5 as we now see it.

John Jay became the first chief justice of the U.S. Supreme Court and served as New York's second governor (public domain)

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 seemingly clearly favored not only the "natural born citizen" restriction on the eligibility to the presidency provided by that concept as articulated by de Vattel in § 212, but who seemingly also meant to fortify and elevate even further the eligibility barrier 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.

In summary, the "higher barrier" posited under a de Vattel § 212 analysis seems to comport far more closely with the intent of the Founders than does a "*WKA*" approach.

Conclusion

Accordingly, for the foregoing reasons, your humble servant submits that a stronger case exists for the "de Vattel" camp regarding presidential eligibility than exists for the "native-born" = "natural-born" camp. That said, it is recognized that the likelihood of the U.S. Supreme Court accepting jurisdiction over a live "case or controversy" among parties with "standing" is, at least with the current composition of the Court, highly unlikely.

Stated otherwise, if in *Laity v. Harris*, USSC Docket 20-1503, *certiorari denied* June 1, 2021, not one single Justice deemed it prudent or necessary to compose an "Opinion Relating to Orders" – either dissenting from the denial of *certiorari* therein or concurring in the denial, and offering explanations and/or clarifications on the natural born Citizen issue – the question remains unanswered in the nation's highest Court. And it appears that it will remain so for the foreseeable future. Move along… nothing to see here.

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Meanwhile, your humble servant still searches for an answer to the question of why, if "native-born citizen" is synonymous with "natural-born Citizen," the natural born Citizen "eligibility" phrase and the "citizen grandfather" phrase in Art. 2, § 1, Cl. 5 of the Constitution use ***different*** words, purported by some to be synonymous, in the ***same*** sentence and separated only by the term "***or***," a "function word indicating an alternative," rather than a "synonym."

I'll wait.