

Revisiting the “What If?” Letter

by [Joseph DeMaio](#), ©2022



David Brearley, 1745-1790 ([public domain](#))

(Dec. 17, 2022) — It has come to your humble servant’s attention that some additional information may be helpful in putting into perspective the “What if?” letter posted [here](#). As the penultimate paragraph of the post confirms, the letter is hypothesized: it is not a real document.

It is posited, however, that it is a not-unreasonable interpolation based on several empirical facts easily extracted from the public domain. Although the “What if?” letter purported to summarize a hypothetical dinner at Ben Franklin’s house among various participants in the Philadelphia Convention, John Jay was selected as the “author” of the letter only because he was the author of the original [“hint”](#) letter to Washington.

First, a name not heretofore frequently mentioned in all of the nbC debates – [David Brearley](#) – plays a significant role. At the time of the Constitutional Convention, Brearley was serving as the Chief Justice of the New Jersey Supreme Court. When the Constitutional Convention in Philadelphia convened, he was in attendance as a delegate from his home state of New Jersey. While there is some clouding on the precise date, it is widely recognized that on or about August 31, 1787, New Jersey Delegate Judge David Brearley was elected Chairman of the [“Committee on Postponed Matters.”](#)

As the name suggests, that committee was charged with tackling some of the more difficult questions facing the convention delegates. One of those questions involved what qualifications, if any, were to be put in place regarding the Commander-in-Chief, ultimately to be labeled the “President.” Whereas originally it had been proposed that the president need only be a “citizen” subject to an age and residency requirement, in its Second Report to the Convention, delivered on September 4, 1787 by Chairman Brearley,

the “natural born Citizen” (“nbC”) restriction and “citizen grandfather clause” exception was [recommended](#) by the Committee for insertion into the final draft of the Constitution.



A download of page 1 of the U.S. Constitution as displayed at the [National Archives website](#)

As all can now see, that suggested “nbC” restriction was adopted by the Convention on September 17, 1787 and now appears in Art. 2, § 1, Cl. 5 of that document. One can even go see it today in Washington, D.C. at the National Archives.

Second, but wait: what about the “citizen grandfather” clause exception? Where did that come from? More importantly, why did it appear at all? None will disagree that the July 25, 1787 “hint” letter sent by John Jay to George Washington did **not** include such a time-limited exception from the strict “nbC” criteria being otherwise “hinted” to Washington. Could it have been an intentional omission by Jay when he made his hint? Not likely, but a couple of theories exist.

One, it was a mere oversight, with Jay failing to take into consideration the fact that, even under a “common law” viewpoint espoused by some as meaning a previously-existing British-American “subject” somehow magically became a U.S. natural born “Citizen” from and after July 4, 1776 – hint: didn’t happen – if you were not already a U.S. citizen on September 17, 1787 when the Constitution was “adopted” – not to be confused with

“ratified,” which did not occur until [June 21, 1788](#) – you would be ineligible to the presidency.

So goes the theory, this would be unfair to those persons who were of foreign nationalities during the Revolutionary War, yet who fought valiantly in favor of the American Revolution and break with Great Britain. To deny those brave people eligibility to the presidency would be an affront to their valor.

On the other hand, the prevailing argument was that the Founders wanted to exclude “foreign” influence from the halls of governmental power, including, in particular, the presidency – whether the foreigner was a “good guy,” a “bad guy” or a “neutral guy” – and the nbC barrier was intended to serve the purpose of excluding such persons from the office. And if rewarding foreigners for their prior valor was a concern, then allowing them into governmental positions *other* than the presidency, including the military, should suffice.

The other possibility was that the oversight involved the more serious problem: under a de Vattel § 212 analysis, who would qualify as a genuine “natural born Citizen” to be eligible to serve as President when the Constitution was signed on September 17, 1787? While all of the Founders became on July 4, 1776 – through the *naturalization* power of the Declaration of Independence – a “U.S. Citizen” from that date forward, they did not magically become “natural born Citizens” as a consequence. Each and all of their parents were either British subjects or foreign citizens.

There is, however, a more logical and, accordingly, compelling interpretation of the nbC clause. Specifically, the mere *existence* and *inclusion* of the “citizen grandfather” clause – inserted by the Founders as a time-limited exception to the strict *jus soli/jus sanguinis* requirements of a de Vattel § 212 “nbC” analysis – confirms that it is the protocol intended and selected by the Founders. Without it, none of the first seven Presidents of the Republic could have constitutionally served.

Reduced to its essence, if a mere “citizen at birth” or “citizen by birth” protocol were to prevail, or if, as others have claimed, from and after July 4, 1776, everyone born here who had been a British “subject” metamorphosed, like caterpillars into butterflies, into a “natural born “Citizen” ... there... would... have... been... no... need... for... the... citizen... grandfather... exception... in... the... first... place.

And when faced with this problem, David Brearley and the Committee on Postponed Matters could have easily reported to the Convention delegates a recommendation that, John Jay’s “hint” to George Washington aside, the nbC eligibility requirement be deleted.

After all, it was clear that the convention was drawing to a close, so the removal of the nbC qualification might have been seen as merely a “stylistic” modification. Instead, the Brearley recommendation was to keep the restriction for future generations, as recommended by Jay, but create a brief “carve-out” for those patriots who might serve as president, but only by virtue of being a “Citizen of the United States at the time of the Adoption of this Constitution.”

Accordingly, it is *because* the “citizen-grandfather” clause *does* exist – even though it is no longer operative and its intended purpose has been met – that the conclusion is inescapable that, without regard to whoever determined that it was needed, or whoever drafted it and/or whether Jay’s “hint” letter simply “overlooked” the problem, the Founders intended that an nbC as defined by § 212 of the de Vattel treatise was to be adopted into Art. 2, § 1, Cl. 5 of the Constitution.

So we should be grateful not only for de Vattel, John Jay and the members of the Committee on Postponed Matters, but also for David Brearley.

It is that simple.