Revisiting the POPE Option

"THE END GAME"

by Joseph DeMaio, ©2023

What did the Framers mean by the term "natural born Citizen?"

(Apr. 18, 2023) — A few weeks ago, your humble servant offered an article suggesting a way of getting the "natural born Citizen" ("nbC") presidential eligibility issue under Art. 2, § 1, Cl. 5 of the Constitution before the U.S. Supreme Court. As readers of *The P&E* well know, virtually all of the myriad challenges over the years to the faux eligibility of Barack Hussein Obama, Jr. and Kamala Harris have been turned away by the Court.

Most frequently, the basis for the Court's continued "evading" of the issue was the Court's finding that the plaintiff(s) challenging either Obama's or Harris's eligibility lacked "standing" to bring their case. While other reasons such as the "separation of powers" and the "political question" doctrines also were cited in support of the continued "evasion" of the issue, the standing issue was by far the most frequent.

So how might one get around these impediments?

Glad you asked.

In another *P&E* post by one Roger Ogden, reposted from the Patriot Fire website, it was proposed that the states could – and should – consider taking steps to ensure that a person aspiring to the presidency or vice-presidency is a "natural born Citizen" in order to be placed on that state's ballots. Stated otherwise, the States could require the candidate to provide documentary proof of eligibility.

Observing the adage of giving credit where credit is due, Mr. Ogden cited to a March 11, 2011 article posted by eligibility guru Mario Apuzzo, who seemingly originated the idea. That origination, in turn, seems to have come as a result of his undertaking the pro bono representation of CDR Charles Kerchner, USN (Ret) in his 2009 challenge to Obama, as recounted by CDR Kerchner in his aptly named "Why I Fight" article here.

No. 10-446
Title: Charles Kerchner, Jr., et al., Petitioners
v.
Barack H. Obama, President of the United States, et al.
Docketed: October 4, 2010
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (09-4209)
Decision Date: July 2, 2010

---Date--- --------Proceedings and Orders----------

Sep 30 2010 Petition for a writ of certiorari filed. (Response due November 3, 2010)
Nov 3 2010 Waiver of right of respondents Barack H. Obama, President of the United States, et al. to respond filed.
Nov 3 2010 Motion for leave to file amicus brief filed by Western Center for Journalism. (Distributed)
Nov 8 2010 DISTRIBUTED for Conference of November 23, 2010.
Nov 29 2010 Motion for leave to file amicus brief filed by Western Center for Journalism GRANTED.
Nov 29 2010 Petition DENIED.

https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-446.htm

After having his case dismissed for lack of standing by the U.S. District Court for the District of New Jersey, and following affirmation of that dismissal by the Third Circuit Court of Appeals, the Supreme Court declined to accept jurisdiction over CDR Kerchner's case, denying *certiorari* on Nov. 29, 2010 in docket 10-446.

Interestingly, the attorney for Mr. Obama in the case, urging a denial of relief to Mr. Kerchner by the Supreme Court, was Acting Solicitor General Neal Katyal…, yes, Virginia, the same Neal Katyal who teamed up with former Solicitor General Paul Clement in 2015 to author the Harvard Law Review Forum (periodical) article captioned "On the Meaning of 'Natural Born Citizen.'"

There, the authors claim: "[A]s Congress has recognized since the Founding, a person born abroad to a U.S. citizen parent is generally a U.S. citizen from birth with no need for naturalization. And the phrase 'natural born Citizen' in the Constitution encompasses all such citizens from birth. Thus, an individual born to a U.S. citizen parent – whether in California or Canada or the Canal Zone – is a U.S. citizen from birth and is fully eligible to serve as President if the people so choose."

This, in turn, seems to be the genesis of the idea that, if you are a "citizen at birth" or a "citizen by birth," with no need for "naturalization," you are, magically, a "natural born Citizen" eligible to the presidency as envisioned by the Founders. Ummm… that theory is intellectual goo.

The Clement-Katyal article is critiqued and dismantled by your humble servant here and here and remains, in your servant's view, ***directly*** at odds with the intent of the Founders when they included the nbC presidential eligibility restriction in the Constitution.

But I digress.

https://www.scribd.com/doc/41131059/CRS-Congressional-Internal-Memo-What-to-Tell-Your-Constituents-Regarding-Obama-Eligibility-Questions#

The Apuzzo article from 2011 is a lengthy and exhaustive articulation of how and why the States possess under the Constitution the right to name the electors for president and establish the criteria for candidates on the primary and general election ballots. Indeed, Apuzzo draws support for his theory from, of all places, the April 3, 2009 memorandum of the Congressional Research Service ("CRS"), authored by one Jack Maskell. This memo, of course, is where the "Elg Ellipsis" first occurred, but that is a topic for another time.

The first four pages of the CRS memo set out the "ground rules" under the Constitution and Supreme Court precedent, at least in Mr. Maskell's view, for the assertion of State authority over the eligibility issue. *P&E* readers would do well, as did Mr. Apuzzo, to read those pages.

Quoting from the Apuzzo article:

"There is … no question that states have the power to run their own presidential and vice-presidential elections. *Storer v. Brown*, 415 U.S. 724, 730 (1974) (the Election Clause, Article I, Section 4, Clause 1 which applies to Congress was intended to grant states authority to protect the integrity and regularity of the election process by regulating election procedure). As part of that process, states must also have the authority over who shall be placed on any ballot to run for president and vice-president."

Accordingly, under Mr. Apuzzo's argument, since the Constitution itself contains no separate definition of the term "natural born Citizen," the States are presumptively free to adhere to their own preferred definition as long as it does not violate some other provision of the Constitution. Thereafter, they can craft legislation requiring candidates to adduce proof of their natural born Citizen status as a precondition of being placed on that state's primary or general election ballots.

And since the closest definition of the nbC term emanating from the USSC is that found in *Minor v. Happersett*, there should be little dispute that a state statute definition that tracks the one found in *Minor* would pass constitutional scrutiny. That conclusion, of course, would be met with derision and howls of protest (and probably screams of racism,

too) from liberals and Democrats and would certainly result in a legal challenge eventually landing the statute before the USSC.

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And that, Virginia, is precisely the end game: getting the USSC to finally answer the question of who is – and who is not – a nbC for constitutional eligibility purposes. If only one state were to pass such a statute, and a "born-anywhere-to-citizen-parents-is-all-that-is-required" candidate refused and was excluded from the ballot, there is zero question that, whoever lost in a lower federal trial or appellate court – whether the candidate or the state – would have litigant and jurisdictional "standing" in the Supreme Court.

Accordingly, your humble servant offers the following proposed non-exclusive template, acknowledging that there are likely many more:

Section 1: Declaration of Intent

It is the intent of this statute to require, as a precondition to the placement of any person's name as a candidate for President of the United States or Vice-President of the United States, on any primary or general election ballot, documentary proof of constitutional eligibility as a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the U.S. Constitution.

Section 2: Proof of Presidential Eligibility

Notwithstanding any other provision of state law, a person declaring his or her candidacy for the office of President of the United States or Vice-President of the United States, and as a precondition to placement on either a primary election ballot or general election ballot, shall, not later than ninety days prior to the deadline for the printing of said primary or general election ballots, provide to the Secretary of State written documentary proof of the person's constitutional eligibility as a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the Constitution.

Section 3. Criteria for Proof of Presidential Eligibility

A. Notwithstanding any other provision of state law, in order to satisfy the requirements of Section 2 of this Act, the documentary proof shall consist exclusively of:

(1) documentary proof of the U.S. citizenship status of both of the candidate's parents at, but not after, the time of the declared candidate's birth, whether the parents themselves be native-born, natural born or lawfully naturalized; and

(2) documentary proof of the birth of the declared candidate within the geographic boundaries of the United States of America, including incorporated territories thereof, but excluding unincorporated territories thereof.

B. The documentary proof required under Paragraph (A) of this section shall consist solely of original sealed or certified copies of birth certificates or parental certificates of naturalization, with uncertified copies, photographs or Internet images of same being specifically disqualified and excluded.

Section 4. Prohibition

The Secretary of State is prohibited from placing on a primary or general election ballot the name of any purported candidate subject to this Act who has failed within the prescribed time limit to provide the required documentary proof to the Secretary of State. A failure by the Secretary of State to comply with this prohibition is declared to be a Class ___ felony.

Section 5. Emergency

This act is deemed to be necessary to address an emergency, and is therefore further declared to take effect immediately upon the signature of the Governor.

In all candor, the likelihood of a statute of this nature ever making it to the desk of a governor willing to sign it rather than veto it may be remote: the fabricated tale that one need only be born here – or, according to Messrs. Clement and Katyal, born *not* in the United States as long as one is "a citizen at birth with no need to go through naturalization" – to be recognized as a "natural born Citizen" has been repeated so many times by so many courts and by so many media talking heads, it has come to possess the patina of "truth." Goebbels was right. But nothing ventured, nothing…, oh, you know the rest.

President Joe Biden and Vice President Kamala Harris take a group photo with the Cabinet members on Tuesday, July 20, 2021, on the South Portico of the White House. (Official White House Photo by Adam Schultz)

The problem, of course, is that this mindset brought us Barack Hussein Obama, Jr. along with his then-vice-president – now the Uber-Goof at 1600 – along with Word Salad Queen Kamala Harris. How many times must the same mistake be committed with the expectation of a better result before the electorate awakens to the insanity of the practice? Enough already. Return to basics and restore sanity to the Oval Office.