

The Heritage Guide to the Constitution

by [Joseph DeMaio](#), ©2023

Under the longstanding English common law principle of *jus soli*, persons born within the territory of the sovereign (other than children of enemy aliens or foreign diplomats) are citizens from birth. Thus, persons born within the United States are plainly “natural born citizens” eligible to be president.

Being born on U.S. soil is not the only way for a person to be entitled to U.S. citizenship at birth, however. A person can be a citizen from birth based on the citizenship of one or both parents—under a British doctrine known as *jus sanguinis*. The First Congress codified that doctrine into U.S. law, declaring that “the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens.” 1 Stat. 104 (1790).

For decades, constitutional scholars have debated whether a person is a natural born citizen eligible to serve as president, so long as he is a U.S. citizen at birth, regardless of the location of his birth. That debate ended as a practical matter in 2008,

<https://www.heritage.org/constitution/#!/articles/2/essays/82/presidential-eligibility>

(Apr. 30, 2023) — The [Heritage Foundation](#) some time ago published “[The Heritage Guide to the Constitution](#).” It was (and continues to be) billed as being “intended to provide a brief and accurate explanation of each clause of the Constitution as envisioned by the Framers and as applied in contemporary law” and in a “clear and understandable” format.

Each clause? Really? This could be interesting, so your humble servant downloaded the digital copy, relishing the fact that it was free.

Far be it from your humble servant to criticize products of one of the leading conservative think tanks in the world and one which is [recognized](#) as “among the most influential public policy organizations in the United States.” But when an organization of that gravitas and stature makes errors, they should be identified and corrected. Such is the goal of this offering.

First, as faithful *P&E* readers might suspect, your servant focuses his attention on that clause in the Constitution relating to the eligibility of persons to serve as president: Art. 2, § 1, Cl. 5, or as it is sometimes called, the “natural born Citizen” clause. The clause – a model of simplicity –

states: “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...”

The meaning of that clause – clear to some, but obscure to many others – has been the subject of much debate over the past few years, as detailed in the various posts of your servant here at *The P&E* over the years as well as in various publications such as the recent book “[Natural Born Citizen](#)” by CDR Charles Kerchner (Ret).

One of the core principles addressed in those posts and publications is that the Founders intended to adopt the definition of “natural born Citizen” derived from Book 1, Ch. 19, § 212 of Swiss jurist and legal author Emer de Vattel’s 1758 treatise, *The Law of Nations*.

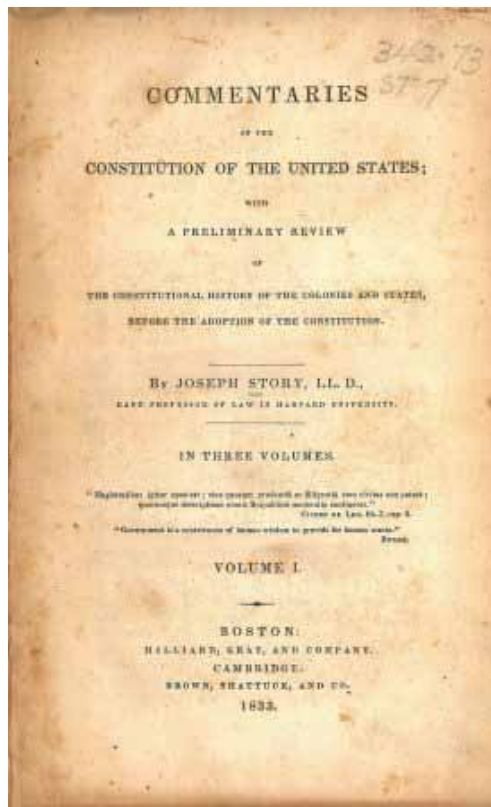
Without diving into the weeds and interstices on the point, de Vattel posited that an “indigène” (later translated to “natural born citizen”) was a person born within the geographic boundaries of a country to two parents, a mother and a father, who were both already citizens of that country. This is the “no doubt” definition recognized by the U.S. Supreme Court in its *Minor v. Happersett* [decision](#) when addressing the original intent of the Founders.

It is also the likely source for Founder John Jay’s famous July 25, 1787 [letter](#) to George Washington as Chairman of the Constitutional Convention in Philadelphia “hinting” that no one other than a “natural born Citizen” (underscoring by Jay) should be allowed to serve as commander in chief of the nation’s military. Given Jay’s familiarity with de Vattel and his fluency in French, § 212 of the treatise is the most likely source for his “hint” letter that only a “natural born Citizen,” as defined by de Vattel, should be allowed into the presidency.

Second, and lamentably, the Heritage “explanation” of the Eligibility Clause [here](#) wanders far away from that reality. Indeed, the “explanation” appended to the constitutional provision was authored by attorney James C. Ho, at that time a partner at the D.C. mega-firm Gibson, Dunn & Crutcher.

Now, Judge Ho serves on the U.S. Court of Appeals for the Fifth Circuit, having been appointed by President Trump. He is no doubt of high intellect and well serves the citizens within the Fifth Circuit. But with utmost respect, his explanation of the meaning of the Eligibility Clause is flawed.

The first flaw in his explanation occurs when he is discussing what Supreme Court Justice Joseph Story had to say about these issues in his famous “*Commentaries on the Constitution of the United States*.” While an attorney before becoming a judge, Mr. Ho wrote: “Justice Story later noted that the natural born citizenship [*sic*] requirement ‘cuts off all chances of ambitious foreigners, who might otherwise be intriguing for the office.’”



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There are two mistakes here. First, there is no such thing as “natural born citizenship.” As explained [here](#), the term is a neologism, a concocted and manufactured one seemingly calculated to blur the distinction between a “citizen” and “citizenship.” It appears nowhere in the Constitution, the 14th Amendment or in any Supreme Court decision. It does appear, however, in various “products” of the Congressional Research Service (“CRS”). Accordingly, any attempt to equate Justice Story’s reference to a “natural born citizen” in his treatise with the neologism “natural born citizenship” is a specious comparison.

The second mistake, even more problematic than the first one, occurs when Mr. Ho states: “Under the longstanding English common law principle of *jus soli*, persons born within the territory of the sovereign (other than children of enemy aliens or foreign diplomats) are citizens from birth. *Thus, persons born within the United States are plainly ‘natural born citizens’ eligible to be president.*” (Emphasis added)

Where to start?

The fact that under English common law – that is, the court-announced law of the country we had just vanquished in the Revolutionary War – a person became a “citizen” had little if anything to do with whether he/she also became a “natural born *subject*” owing perpetual allegiance to the Crown. Recall that the main purpose of the Revolutionary War was to cast aside the “subject/liege” relationship in favor of a “citizen/constitutional republic” relationship.

Moreover, for Mr. Ho to contend that this principle from Great Britain was consciously replicated here following the end of hostilities completely ignores Founder George Mason’s

famous [observation](#) during the Virginia constitutional ratification proceedings that: “[t]he common law of England is *not* the common law of these [United] [S]tates.” (Emphasis added).

Adding insult to injury, for some inexplicable reason, Mr. Ho never mentions Emer de Vattel or his treatise, which the U.S. Supreme Court has described as “the most widely cited in the 50 years after the [American] Revolution.” *See United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n.12 (1977). Mr. Ho, before becoming a federal Court of Appeals judge, also succeeded Senator Ted Cruz as the Solicitor General of Texas, so any claim that he was unaware of de Vattel or his tome regarding this topic would be difficult to understand.

In addition, Mr. Ho’s use of the word “[t]hus” in his next sentence compels the conclusion that he is basing his following statement that a “citizen from birth” can “plainly” otherwise be president because that person is, purportedly, a “natural born Citizen” is, with respect, a patent *non sequitur*.

Following the issuance of the various equally flawed memoranda and reports of the CRS and the periodical publication of “[On the Meaning of ‘Natural Born Citizen’](#)” by former U.S. Solicitors General Paul Clement and Neal Katyal, the “citizen from birth” phrase used by Mr. Ho has usually evolved into the “citizen at birth” or “citizen by birth” substitutes.

However, under any of the three variant phrases, *none* supports the conclusory assertion that mere birth here, without reference to the citizenship of the child’s parents, renders one a “natural born Citizen” within the contemplation of the Founders. And the “gimmick” utilized by Messrs. Clement and Katyal in their article, *i.e.*, that becoming a U.S. “citizen” without the need to undergo a “naturalization process” *ipso facto* renders one a “natural born citizen” eligible to the presidency is also, respectfully, a manifest *non sequitur*.

Mr. Ho then explains: “Being born on U.S. soil is not the only way for a person to be entitled to U.S. citizenship at birth, however. A person can be a citizen from birth based on the citizenship of one or both parents—under a British doctrine known as *jus sanguinis*.”



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Apart from the fact that Great Britain adopted the rule of *jus soli* – birthplace governs rather than parental bloodline – the *jus sanguinis* doctrine as well as the *jus soli* principle were central to the concept of who could be an “indigène,” later translated to “natural born citizen,” under Book 2, Ch. 19, § 212 of Emer de Vattel’s 1758 treatise.

As incessantly repeated by your humble servant in prior *P&E* posts, *The Law of Nations* was continually consulted by the Founders as they drafted the Constitution. In fact, it has been described as being “of seminal importance” to the Founders since “no other treatise on international law came close to being as widely read *or as heavily relied upon* by the [American] Revolution’s leaders.” See Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 395, 404 (2012). Yet Mr. Ho mentions it not once in his explanation.

Mr. Ho continues: “The First Congress codified that [*jus sanguinis*] doctrine into U.S. law, declaring that ‘the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens.’ 1 Stat. 104 [*sic*] (1790).”

Ummmm... respectfully, no, Congress did not.

The law to which Mr. Ho was likely referring was 1 Stat. **103**, not 1 Stat. 104. Mr. Ho also conspicuously – and problematically – neglects to disclose that, a mere five years after enacting 1 Stat. 103, and likely realizing that it could not amend the natural born Citizen eligibility clause of the Constitution by a statute, repealed the 1790 Act in its entirety. 1 Stat. 414 (1795) eliminated the “natural born” modifier before the term “citizen,” thereby making children born thereafter to U.S. parents “beyond sea,” say, in Canada or the Panama Canal Zone, “citizens,” but no longer considered as “natural born citizens.”

This change was also consistent with a congressional acknowledgment that the 1790 Act and the 1795 Act **both** were acts relating to “naturalization,” not declarations of who could be a “natural born Citizen” if born “beyond sea” to U.S. citizen parents. This chronology – ignored by Mr. Ho when his original explanation was written as a private attorney – is discussed [here](#) and [here](#).

Mr. Ho then asserts: “For decades, constitutional scholars have debated whether a person is a natural born citizen eligible to serve as president, so long as he is a U.S. citizen at birth [*sic*: the “so long as he is a U.S. citizen at birth” qualifier is a false pre-conditional assumption], regardless of the location of his birth. That debate ended as a practical matter in 2008, when the United States Senate unanimously approved a resolution deeming Senator John McCain eligible for the presidency.”

The notion that a Senate Resolution – specifically, [S.Res. 511](#), discussed and dismantled [here](#) – can, via *ipse dixit* (“it is so because I say it is so.”), declare John McCain or anyone else “eligible” to the presidency apart from the words and intent of Art. 2, § 1, Cl. 5 of the Constitution is fantasy on steroids. Moreover, the reliance by the Senate in S.Res. 511 on 1 Stat. 103 – as if it were still the law in 2008 (or even today) – merely underscores how intellectually challenged the Senators who sponsored that non-binding resolution were.

Those members of the purported “[greatest deliberative body in the world](#)” who sponsored the resolution were its author, Senator Claire McCaskill (D. Mo.), who 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.), Hillary Clinton (D. N.Y.) and – most interestingly – Barack Hussein Obama, Jr. (D. Ill.).

Want to take a *wild* guess as to why the Second Usurper in Chief (aka the “SUC”) would want to sign onto that resolution? Seriously? The Resolution was adopted by unanimous consent of the full Senate on April 30, 2008. Greatest deliberative body in the world? For a body believing in the “ghost of 1 Stat. 103,” that characterization might be a stretch.

Mr. Ho finishes his explanation thusly: “The resolution also added that any other view 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 own statute defining the term ‘natural born Citizen.’”

Again, the ignorance – or cunning guile such as present in those intent on targeting the presidency in the future – of those supporting S.Res. 511 in 2008 is stunning. To base, even partially, a resolution – non-binding and meaningless at that – on a law that was repealed 228 years ago and only five years after its enactment on the apparent realization that it was unconstitutional by the same body now considering its reincarnated applicability speaks volumes about the folks we elect to represent us. Stated otherwise, it is just plain dumb.

Accordingly, the Heritage Foundation should revisit the “explanation” authored by James Ho when he was in private practice. Otherwise, Heritage readers could leap to the unfortunate conclusion that it was taking clues from the CRS on how to obfuscate, rather than address, the natural born Citizen issue.

Not good. Dumb.