The Simmering nbC Issue

by Joseph DeMaio, ©2025

Photo: Sharon Rondeau

(Sep. 12, 2025) — **Introduction**

As the "birthright citizenship" issue strolls its way through the lower federal courts, its related "kissing cousin" issue – the "natural born Citizen" ("nbC") presidential eligibility restriction – remains on a back burner, simmering in a pot of widespread electorate, academic and media indifference. Happily, one of the few Internet sites where these issues are ***not*** treated so casually is the one you are now visiting: *The Post & Email.*

To that point, two recent federal appellate court decisions may play a significant role in again bringing the nbC issue to a front, instead of a back burner, and nationwide and not just at *The P&E.* That said, faithful readers, remember: you heard it here first.

Specifically, the June 3, 2025 decision of the Second Circuit in *Hadwan v. U.S. Department of State* and the August 20, 2025 decision of the Ninth Circuit in *Moncada v. Rubio* (23-55803.pdf) shed useful light not only on the birthright citizenship issue, but also on the nbC definitional issue.

While both decisions involved persons who claimed to be 14th Amendment "citizens," thus implicating the birthright citizen question under the amendment's "subject to the jurisdiction of the United States" requirement, the language used by the two separate appellate three-judge court panels in each case provides insight into where the judiciary, or at least some of the judiciary, might be headed regarding the definition of who can, and more importantly who *cannot* properly be declared to be an nbC.

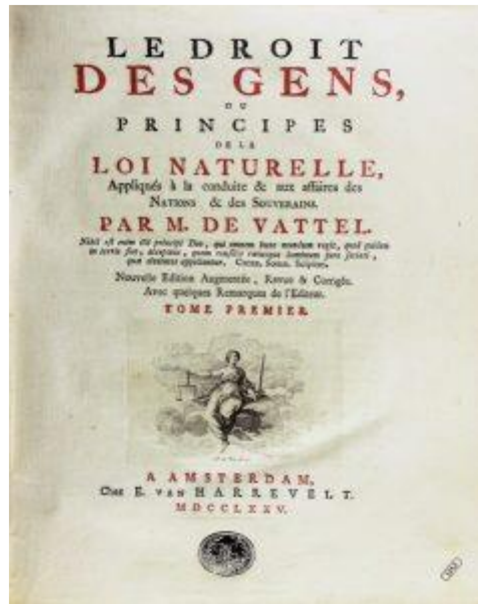
The cases, while tangentially related, are addressed separately and analyzed below. Spoiler alert: your humble servant believes the unanimous *Moncada* opinion is the far better reasoned and thus correct decision while the result-driven *Hadwan* split (3-2) decision is poorly reasoned and, apart from the dissent, should be reversed and vacated.

Legal Analysis and Discussion

The Moncada Opinion

The Ninth Circuit decision in *Moncada* has already been well and accurately discussed at *The P&E* here in a posting by the intrepid *P&E* Editor and long-time *P&E* contributor CDR. Charles F. Kerchner, Jr. (RET) at his own website containing a video by one Robert Goveia addressing the case. In summary, because when Roberto Moncada was born in New York City in 1950 to a father who was the Nicaraguan attaché to the United Nations, he became at that moment cloaked with the same "diplomatic immunity" from the application of U.S. law possessed by his father.

Despite spending some 75 years as a putative U.S. citizen, the Ninth Circuit panel found in 2025 that his immunity rendered him ever since birth ***not*** "subject to the jurisdiction" of the United States. Thus, his claim to birthright citizenship under the 14th Amendment was rejected by both the lower federal District Court and the Ninth Circuit panel. As a result, his putative status as a "citizen" was voided. Readers are encouraged to access and read the Rondeau/Kerchner post.


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 PREMIER.
A AMSTERDAM,
Chez E. van HARREVELT.
MDCCLXXV.

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The critical point to be gleaned from that conclusion, however, is that as noted in the above *P&E* Rondeau/Kerchner post, in reaching its conclusion, the panel relied upon and specifically quoted Swiss attorney, jurist and publicist Emer de Vattel from his 1758 treatise, *"Le Droit des Gens"*(1758, Paris) or"*The Law of Nations*" (1760 London).

The significance of the panel's reliance on the de Vattel treatise lies in the fact that many "experts" in academia as well as the federal government reject and disregard de Vattel and his tome as having any materiality, relevance or value with respect to the definition of the term "natural born citizen" found in Book 1, Ch. 19, § 212 ("212") of his treatise. There, a "natural born citizen" is clearly defined – not merely categorized – as a person born in a country to parents who are already citizens of that country. This fact was recognized by the Supreme Court in its *Minor v. Happersett* decision in 1874.

The panel's reliance mirrors a recent (2019) similar reference to and acceptance of the authority of de Vattel and his tome by the Supreme Court in *California Franchise Tax Board v. Hyatt*. Indeed, even more recently (2023), three concurring Justices and one dissenting Justice in *Haaland v. Brackeen* cited de Vattel in support of their respective positions. Whether concurring or dissenting, the Justices cited and relied on de Vattel to support their differing opinions.

However, of perhaps the greatest significance is the very recent (June 20, 2025) Supreme Court decision – discovered by your humble servant while composing this offering – in *Fuld v. Palestine Liberation Organization*. In his concurring opinion, Justice Thomas (joined by Justice Gorsuch) not only cites with approval de Vattel and the treatise, he adds this important nugget (concurrence at fn. 1) "[de] Vattel was '*widely consulted by the constitutional generation in the United States*,'' and was '*invariably invoked as*

authoritative on matters of international law by the likes of Alexander Hamilton, James Madison, James Wilson, Edmund Randolph, Thomas Jefferson, John Marshall, Joseph Story and James Kent, among others.' M. Ramsey, Executive Agreements and the (Non)treaty Power, 77 N. C. L. Rev. 133, 169–170 (1998) (internal quotation marks omitted)." (Emphasis added)

The subject matter of the *Hyatt*, *Haaland* and *Fuld* decisions is immaterial. On the other hand, that which ***is*** both material *and* relevant is that in the differing views of today's Supreme Court Justices, de Vattel and his treatise remain both vibrant and authoritative. Whether relating to taxation (*Hyatt*), Native Americans (*Haaland*) or personal jurisdiction under the Antiterrorism Act of 1990 (*Fuld*), de Vattel and his tome exist in the minds of present-day Justices as authoritative law. And if that is true for the cited cases and their respective subject matters, there is no rational reason to believe or contend that an identical authoritative import and gravitas should be denied as to an analysis of § 212 and the Founders' intent in adopting it in the Constitution.

Against this backdrop of contemporary statements from Supreme Court Justices, recall that, as discussed here, the Congressional Research Service ("CRS") long ago absurdly – not to mention bizarrely – contended (at p. 22) that the Founders could not possibly have relied on de Vattel's definition in § 212 because, purportedly, no French-to-English translation of the natural born citizen definition existed when the nbC clause was inserted into the Constitution. This is nonsense elevated to an art form by the purported repository of "the nation's best thinking." If this CRS argument exemplifies the nation's "best thinking," the Republic is in deep trouble.

Apart from the easily-discovered fact that an English translation of the treatise was, in fact, printed, published and available in London in 1760, the CRS fatuously ignores the additional fact that many if not *most* of the delegates to the constitutional convention understood French, that era's language of diplomacy.

But I digress.

Again, the Supreme Court's continued contemporary (2025) citation to and reliance upon de Vattel and his treatise should put an end to the CRS nonsense that the Founders could not possibly have relied on the § 212 definition as the source for the nbC clause. People who continue to believe that *ipse dixit* fantasy – including "well-credentialed" lawyers and "expert" academics – need to ingest some highly-caffeinated beverage and get a serious grip on reality. The Ninth Circuit opinion in the *Moncada* case, against the SCOTUS decisions in *Hyatt*, *Haaland* and *Fuld*, is clearly a step in the right direction to vindicate that the most likely source for the nbC restriction the Founders actually adopted was § 212.

The Hadwan Opinion

The following discussion and analysis of the *Hadwan* opinion (139 F.4th 209 [Fourth Circuit 2025]) is included as an example of the manifest and blatant errors of two Democrat Second Circuit judges – (Guido Calabresi [a Clinton appointee] and Myrna Pérez [a Biden appointee]) as a result of their reliance on their concocted *ipse dixit* ("it is so because I say it is so") reasoning in arriving at their legally flawed conclusions.

Factually, Mr. Hadwan had his U.S. passport and "Consular Report of Birth Abroad" ("CRBA") revoked and forfeited by the U.S. Embassy in Sana'a, Yemen. Hadwan claimed that he was a U.S. citizen by virtue of being born in Yemen to a Yemini mother and, purportedly, a U.S. citizen father. When the State Department discovered that his father's claimed U.S. citizenship was likely fraudulent, the passport and CRBA revocations were triggered.

The opinion begins its tortured and flawed path in its first sentence, claiming *via* groundless *ipse dixit* that "Mansoor Hamoud Hadwan is *legally a natural-born United States citizen*…." (Emphasis added) There is absolutely *zero* evidence in the court's opinion or the record on appeal supporting that assertion. Indeed, it is judicial *ipse dixit* wrapped in whole cloth.

Moreover, the entire case on appeal addressed *exclusively* the procedural and "due process" irregularities Hadwan alleged that the State Department had committed. Nothing – as in *zero* – was addressed regarding his claimed "citizenship," thus preserving the panel's majority court-concocted misrepresentation of his status as a "natural-born Citizen." Again, there is absolutely nothing in the lower District Court record or the Second Circuit appellate record even suggesting, much less establishing, that he was an nbC.

Accordingly, that assertion in the court's first sentence is flat wrong…, yet it forms the cornerstone of the opinion's ultimate conclusion that the State Department violated its own procedural rules, thereby denying Hadwan his due process rights.

In fact, in addressing the State Department's procedural errors, the court wrongly states (139 F.4th at 215) that "[n]atural-born citizens who are born outside of the United States [*sic*] may obtain a CRBA as documentation of their citizenship by submitting 'satisfactory proof of birth, identity and nationality' to a U.S. consular officer. 22 C.F.R. 50.7(a)"

Where to start, where to start? First, if § 212 applies in the Constitution (and your servant posits that it does), a true nbC must be born ***in*** the United States, and ***not*** "*outside* of the United States." The court's misstatement might make sense under the reasoning of the Clement/Katyal Harvard Law Review Forum article critiqued here, here and here, but since that article is also wrong on the point, the Second Circuit court's assertion is wrong too. Second, the court's citation to 22 C.F.R. [§] 50.7(a) as supporting its result also badly misses the mark, because as the regulation plainly states – in plain English and not French –: the rule applies *only* to a "citizen" and *not* to an nbC.

The *Hadwan* majority opinion also states (139 F.4th at 216, n. 5): "A person may be a natural-born citizen constitutionally, U.S. Const. amend. XIV, § 1 [*sic*] or by statute, 8 U.S.C. § 1401(c)–(h). Not all citizenship acquired by statute is naturalization." The *Hadwan* majority panel should have read more closely the decision in *United States v. Wong Kim Ark*, (169 U.S. at 702), where the Supreme Court states *exactly* the opposite. The *Hadwan* opinion footnote continues, *id.*: "And not all citizenship acquired at birth comes from the Constitution and from being born within the territorial boundaries of the United States. *A person born a citizen pursuant to a statute, like Hadwan, is a natural-born citizen [sic].*" (Emphasis added). Once again, this assertion is judicially-concocted *ipse dixit*, and wrong as well. And the assertion that the 14th Amendment creates a path to becoming an nbC is laughable, almost but not quite as laughable as the CRS contention that because the Founders purportedly could not understand French, they could not possibly have understood the § 212 definition in the de Vattel treatise.

Finally, the Second Circuit appellate opinion also speculates regarding the U.S. Embassy's Sana'a actions that: (139 F.4th at 217. n. 8): "It is possible that the Sana'a Embassy denied Hadwan's requests because he did not squarely fit within this guidance *owing to his status as a natural-born citizen whose CRBA had been revoked, instead of a naturalized citizen*." (Emphasis added) Bizarre, absurd …, and wrong.

Further discussion of the *Hadwan* appellate decision would be pointless. It is flat wrong in characterizing Mr. Hadwan as an nbC. Yet it appears in print as a decision of the Second Circuit. Accordingly, one can rest assured that, unless reversed by the Supreme Court, the "de Vattel Deniers," including "well-credentialed lawyers," will seize upon it as purportedly confirming that anyone who is a "citizen at birth" or a "citizen by birth," regardless of parental citizenship or global "happenstance" place of birth, is "close enough" for the government work of serving as an eligible nbC president.

No serious student of the nbC issue could honestly believe that theory. Accordingly, those who *do* believe in and advance the theory are, respectfully, ***not*** serious students of the topic.