The Tulsi Gabbard House Eligibility Question

IS A "U.S. NATIONAL" ELIGIBLE?

by Joseph DeMaio, ©2019

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(Jul. 10, 2019) — OK, P&E readers, stick with me here for a while, as this may get a bit convoluted. Recently, your faithful servant offered this post positing that Rep. Tulsi Gabbard is likely not a "natural born Citizen" as required for eligibility to the presidency under Art. 2, § 1, Cl. 5 of the Constitution. The term "likely" is used because there is – as yet – no U.S. Supreme Court decision directly on point with regard to a "ripe" "case or controversy" addressing the underlying "natural born Citizen" eligibility issue. Yes, *Minor v. Happersett*, 88 U.S. 162 (1874) is really close, but not dispositive.

The long and short of that post was that because the place of Ms. Gabbard's birth – American Samoa – is an unincorporated territory under the jurisdiction of the United States, but not a state incorporated into and within the United States, she would not meet the criteria of a "natural born Citizen" as articulated in the Constitution or in § 212 of Emmerich de Vattel's *The Law of Nations*.

De Vattel's tome, relied upon by the Founders when they were drafting the Constitution in 1787, was recently acknowledged by the Supreme Court as being the work of "the founding era's foremost expert on the law of nations." *See California Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493-1494 (2019). So much for the haughty and denigrating characterization of de Vattel by the Congressional Research Service ("CRS") with regard to the issue of presidential eligibility. That prior post, however, focused on Rep. Gabbard's purported eligibility under the "natural born Citizen" clause in Art. 2, § 1, Cl. 5. The issue was first addressed earlier this year, with one legal scholar opining that if she becomes a viable presidential candidate, the eligibility issue will surface "absolutely."

However, Ms. Gabbard may face another problem under Art. 1, § 1, Cl. 2 of the Constitution, which states: "No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, *and been seven Years a Citizen of the United States*…." (Emphasis added). Unless Ms. Gabbard is already a naturalized U.S. citizen, either through the formal application process or as the beneficiary of a "private bill" of naturalization, she does not appear to meet the eligibility criteria of the Constitution for Members of the House of Representatives.

Stated otherwise, she needed to be both a "citizen" of the United States and possessed of that status for seven years prior to first taking her seat in the House in 2013. Quite apart from whether she is a "natural born Citizen," she also may not be eligible to serve in the House, since American Samoa is not an incorporated territory of the United States and people born there are deemed to be "nationals" of the U.S., but not "citizens." Congress could change that, but has not yet done so.

This result is mandated by a federal statute, 8 U.S.C. § 1408 and as confirmed by federal appellate (but as of yet, not U.S. Supreme Court) decisions. *See, e.g. Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied,* 136 S. Ct. 2461 (2016). While the denial of review via *certiorari* by the Supreme Court is not a decision on the merits of a particular case, it is nonetheless indicative of the Court's view that the lower court's decision was not sufficiently "wrong" or "problematic" to warrant acceptance of the case for review. In other words, the Supreme Court apparently did not consider the D.C. Circuit Court opinion – holding that the "Citizenship Clause" of the 14th Amendment did *not* guarantee birthright citizenship to persons born in American Samoa – to be in need of correction via acceptance of the *certiorari* petition.

There are those who would nonetheless argue that, under federal law, purportedly, Ms. Gabbard possesses citizenship as a "citizen by birth" because her mother was born in Indiana and her father, although born in American Samoa, was born to a U.S. citizen father. The contention is based not directly on federal statutory "law" (*i.e.,* 8 U.S.C. § 1408), but rather on a "policy manual" issued by the U.S. Citizenship and Immigration Services Division of the Department of Homeland Security. That policy manual references §§ 301 and 309 of the 1952 Immigration and Nationality Act, corresponding, respectively, to present-day 8 U.S.C. §§ 1401 and 1409.

The first section deals with the acquisition of "citizenship at birth" and the second section deals with the citizenship status of "children born out of wedlock," an issue not present in Ms. Gabbard's case. However, the policy manual also lists – unlike the "outsidethebeltway.com" link referenced in the preceding paragraph above – 8 U.S.C. § 1408, which, as already noted, is entitled: "Nationals but not citizens of the United States at birth." Until held unconstitutional or changed, that statute controls.

Thus, the arguments advanced by the "outsidethebeltway.com" website parallel those made by the CRS, *i.e.*, that citizenship acquired "at birth" or "by birth," without more, qualifies one not only as a "citizen," but also renders that person a "natural born Citizen" for Art. 2, § 1, Cl. 5 presidential eligibility purposes. Wrong, but par for the course for the CRS and, apparently, for the folks at the website. The bottom line is this: unless Tulsi Gabbard was naturalized as a U.S. citizen at least seven years prior to 2013, when she first took her seat in the House of Representatives, or naturalized at least seven years prior to 2018, when she was re-elected to her current term in the House, she appears to be ineligible as a Representative from Hawaii under Art. 1, § 1, Cl. 2 of the Constitution.

However, because the House (and the Senate) possess under Art. 1, § 5, Cl. 1 of the Constitution exclusive jurisdiction to judge the "Qualifications of its own Members…," the fact that Ms. Gabbard may not be constitutionally *eligible* – an issue separate and distinct from her *qualifications* – would likely never be subjected to judicial challenge, as the courts would likely refuse to hear the dispute on the grounds that it was a "political question," the entertaining of which would violate the "separation of powers." And even if challenged by another Member of the House, the likelihood of Speaker Pelosi bringing an expulsion motion to the floor for a vote is, on a scale of 1 to 10, a negative 13.

The legal issue as to whether the federal statute declaring persons born in American Samoa to be U.S. "nationals" but not U.S. "citizens" violates the 14th Amendment is apparently being litigated by another individual in Utah (a person born in Samoa, but not a member of Congress), but its status is unclear. Your faithful servant will monitor that case and report back.

Finally, none of the foregoing should be taken to derogate Ms. Gabbard's service to the nation in the military, both in Iraq and in the Hawaii National Guard, but only to question her eligibility to serve in the U.S. House of Representatives, her liberal/progressive policies aside. If any faithful P&E reader has contrary information as to her *bona fides*, yours truly would be pleased to know of it.