The Unanswered Question

by Joseph DeMaio, ©2022

(Apr. 19, 2022) — From time to time, your humble servant has found it useful to revisit the issue of presidential eligibility under Art. 2, § 1, Cl. 5 of the Constitution and what the likely meaning of the term "natural born Citizen" therein was seen to be from the perspective of the Founders.

Far from being "settled" by way of a U.S. Supreme Court decision addressing the natural born Citizen requirement of the Eligibility Clause in a jurisdictionally-sound, actual "case and controversy" among parties with "standing," the question remains unresolved insofar as a binding Supreme Court decision on the merits is concerned.

Contrary arguments that the Supreme Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) ("*WKA*") and certain state court cases interpreting *WKA* as, for example, *Ankeny v. Governor of State of Indiana*, 916 N.E.2d 678 (App. 2009) control resolution of the issue are – respectfully – wrong, as discussed here.

To reiterate your servant's view, all of the discussion regarding "natural born Citizen" in *WKA* insofar as presidential eligibility is concerned is, quoting Charles Gordon, "dictum, pure and simple." At the time he wrote his law review article, Charles Gordon was the General Counsel, U.S. Immigration and Naturalization Service, and Adjunct Professor of Law, Georgetown University Law Center.

And as Supreme Court Justice Scalia insightfully noted in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12: "Dictum settles nothing, even in the court that utters it…," discussed here.

In addition, lower court decisions not reviewed by the Supreme Court don't count as "dispositive" on this core constitutional issue. Worse, no Supreme Court Justice has yet seen fit to pen an "Opinion Relating to Orders" addressing the issue upon either the summary affirming or denial of certiorari of a lower court decision adjudicating the question.

Judge Ketanji Brown Jackson will take her seat as a U.S. Supreme Court Associate Justice this summer upon the retirement of Associate Justice Stephen Breyer

Here's a scary thought: perhaps newly-seated Justice Jackson will take the opportunity when the next case challenging the eligibility of Kamala Harris – or perhaps Ted Cruz or some other purported "natural born citizen" presidential candidate – reaches the Court. Yikes.

Furthermore, the ruminations of learned law professors and attorneys that "[f]ortunately, the Constitution is refreshingly clear on these eligibility issues…," are also – again, respectfully – inconsistent with empirical evidence as to the original intent of the Founders. That evidence suggests a "de Vattel" preference which – unlike a 14th Amendment "citizen at birth" or "citizen by birth"/"common law" approach – combines both birth here with parental U.S. citizenship as essential.

With these facts in mind, your servant recently offered a post captioned, "Response to Multiple Comments on the Natural Born Citizen Issue." That post garnered many robust comments from both sides, which is unusual and would be unexpected if, in fact, one truly accepts that the matter is "settled."

The spirited arguments, hypotheses and references to historical facts produced by the myriad comments – facilitated, in no small part, by The P&E platform's fierce dedication to the First Amendment – led to the emergence of some interesting exchanges.

William Rawle, portrait by Benjamin West (public domain)

Some of the exchanges included references to the remarks of one William Rawle, a Philadelphia lawyer commenting on the natural born citizen issue and positing in his 1825 work, "A View of the Constitution of the United States" that "[T]herefore every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution."

Since the only place where the term "natural born Citizen" appears in the Constitution is in the presidential Eligibility Clause, Art. 2, § 1, Cl. 5, it is obvious that Rawle was articulating his opinion with reference to the presidency.

In that regard, a subsequent series of exchanges among your servant and several "non-Vattel" commenters raised a question which remains as yet unanswered. Those commenters maintain that, with the exception of the offspring of diplomatic personnel and hostile occupying forces, any person merely born here – regardless of the alien or foreign citizenship of the parents – is a "natural born Citizen" eligible to the presidency. This was Rawle's view.

All students of the eligibility issue – from both sides – will agree that one of the core foundational principles motivating the Founders in their intent to restrict the presidency to a "natural born Citizen" was to preclude and as much as possible prevent for the future the insinuation of foreign influence into the newly-formed government and the highest office of same, the presidency, or in the nomenclature of the day, the "Chief Magistrate."

Because there were no U.S. "natural born Citizens" in 1787 under a "de Vattel" analysis, the Founders added a "grandfather clause" to allow a "Citizen of the United States, at the time of the adoption of this Constitution…" – ***naturalized by law*** as a result of the

Declaration of Independence rather than by birth here – to also enjoy a time-constrained period of eligibility.

Founding Father John Jay suggested to George Washington in a 1787 letter that the president and "command in chief" should be limited to a "natural born Citizen"

That the goal of precluding the insinuation of foreign influence was paramount in the mind of Founder John Jay is apparent through an examination not only of his July 25, 1787 famous "hint" letter to the Chairman of the Constitutional Convention, George Washington, but also by the headings selected by "Publius," the pen-name used by the "Federalist Papers" authors James Madison, Alexander Hamilton and John Jay, describing the topics being addressed in the collection of the 85 essays constituting The Federalist.

Specifically, it is generally acknowledged that Jay, as one of the Publius authors, penned Federalist Essays 2, 3, 4 and 5. Federalist 1, penned by Alexander Hamilton, sets the introductory stage for the following essays intended to persuade – through among other New York newspapers, the "Independent Journal" – the citizens of New York to approve and ratify the new Constitution.

In the collection of finally published essays, Federalist 2 is captioned, "Concerning Dangers from Foreign Force and Influence." Similarly, Federalist 3 is titled, "The Same Subject Continued: Concerning Dangers From Foreign Force and Influence." Federalist 4 and 5 bear the same captions as Federalist 3. Stated otherwise, it is evident that the Publius authors, and in particular John Jay, sought to emphasize in the first several of the 85 essays their concerns over the potential threats to the newly-formed republic presented not only by hostile foreign military forces, but also by "foreign influence" which might infect and undermine the republic.

Jay's concerns are only fortified in Federalist 68, where Publius author Hamilton railed that, in forming the foundations of the republic,

"[n]othing was more to be desired than that *every practicable obstacle should be opposed to cabal, intrigue, and corruption*. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, ***but chiefly from the desire in foreign powers to gain an improper***

ascendant in our councils. *How could they better gratify this, than by raising a creature of their own to the* ***chief magistracy*** *of the Union?*"(Emphasis added)

The Founders were thus intent upon not simply avoiding, but prohibiting and preventing, as much as humanly possible, the "improper ascendency" of "foreign powers" and foreign influence into the "chief magistracy of the Union."

Against this backdrop, one question your servant posed to the "non-Vattel commenters here was this: If the acknowledged goal of the Founders was to erect as high a barrier as possible to the insinuation of foreign influence into our government, why would they have selected the ***lower*** barrier – the "common law" barrier defining a natural born citizen as merely one born here without regard to the citizenship status of the person born – as opposed to the known ***higher*** barrier premised on the teachings of de Vattel and requiring U.S. parental citizenship in addition to birth on U.S. soil?

Emmerich de Vattel (public domain)

Plainly, a "common law" approach to examining the Founders' intent regarding the meaning of the "natural born Citizen" restrictive obstacle they inserted into the Constitution – relying merely upon place of birth (*jus soli*) without reference to parental citizenship (*jus sanguinis*) – presents a *lower* barrier to the insinuation of foreign influence into the "chief magistracy of the Union" than does a "de Vattel" approach.

Indeed, whether it be deemed "holding" or "dicta," the unanimous decision of the U.S. Supreme Court in *Minor v. Happersett*, 88 U.S. 162, 167-168 (1875), *abrogated by the 19th Amendment* (1920), noted that:

"[t]he Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, *it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their*

birth, citizens also. These were natives, or *natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts,* ***but never as to the first.****"* (Emphasis added)

Interestingly, the Court's statement in *Minor* acknowledges that, even under a "common law" analysis utilizing the "nomenclature of which the framers of the Constitution were familiar…," a "de Vattel" analysis of the term more likely comports with the Founders' intent regarding the relevance and necessity of parental citizenship.

Stated otherwise, the Court observed that although there had been "doubts" about a definition of a "natural born Citizen" structured without regard to parental or *jus sanguinis* principles, as to "all children born in a country of parents who were its citizens…," the "natural born citizen" empirical nature of such persons had ***never*** been in doubt.

Thus, your servant posed the question: why would the Founders have chosen a lower (*i.e.*, ***less*** restrictive, "common law") barrier to the insinuation of foreign influence into the "chief magistracy" when a known and available higher (*i.e.*, ***more*** restrictive, "de Vattel") barrier existed?

Commenter Fremick responded: "The Framers picked the barrier [t]hey were most familiar with…," likely implying an intentional selection of the "common law" barrier of exclusive *jus soli* analysis to determine status as a "natural born Citizen" to the exclusion of a parallel or coupled *jus sanguinis* analysis as posited by de Vattel's § 212 in his tome, *The Law of Nations*.

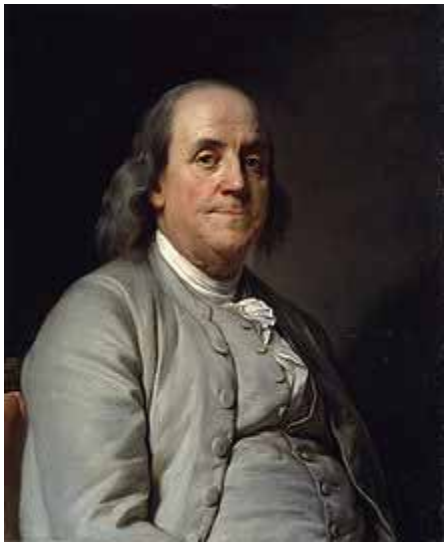
The following paragraphs are your servant's response to the Fremick contention.

"Respectfully, this result [*i.e.*, selection of the lower, "common law" non-Vattel barrier because it was "familiar" to the Founders] makes zero sense. At all.

"It presumably also suggests that at one or more of those bi-weekly meetings of the 'Society for Political Inquiries' taking place at Benjamin Franklin's house in 1787, the participants may have addressed whether the lower barrier – *jus soli* birth alone, regardless of parental citizenship status – was to be preferred to the higher barrier in blind adoption of a 'common law' approach inherited from a nation we had just defeated in the Revolutionary War. Stated otherwise, it was 'familiar' and 'convenient.'"

"Under this scenario, one can imagine hypothetical exchanges not unlike this:

"William Rawle: 'I say that any person born here is a natural born citizen, the foreign or alien status of the parents notwithstanding, and thus, eligible to the presidency. The common law dictates it.'

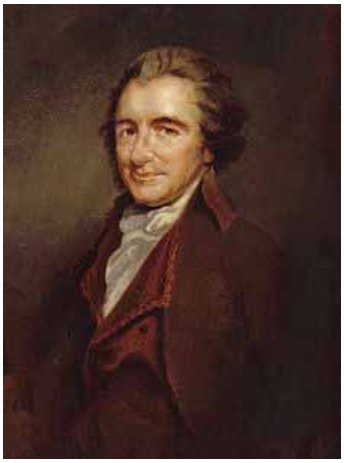


“Benjamin Franklin: ‘But William, now that hostilities with Great Britain are over, would not your definition allow, for example, British General William Howe…, responsible for nearly 7,000 battlefield deaths of our fellow patriots…, to visit New York or even here, Philadelphia, on holiday with his expectant wife? And if their son were born here, in Philadelphia, of all cities of the United States, would that not have created an individual of British parents eligible to the highest office in our government, the teachings of Vattel aside? Do you think that the Committee of Eleven and the other delegates over at Independence Hall would agree to that?’

“Rawle: ‘Well…, the common law, with which we are all familiar, must prevail…, sometimes you must break a few eggs to make an omelette. And the likelihood of your General Howe example taking place is remote.’

“Long pause… furtive glances among the participants… then:

“Franklin: ‘With respect, Mr. Rawle, “likelihood” and “remote” are not the same as “impossible,” which is the goal I thought we were pursuing in shielding absolutely the presidency from foreign influence. It is what Vattel teaches and what I think is needed.’



Thomas Paine authored the pamphlet, "Common Sense" in 1776

"Thomas Paine: 'I agree with Dr. Franklin. Familiarity with the common law and convenience aside…, it is only common sense.'"

Your humble servant has waited now for nearly a full month to see if a responsive answer would be forthcoming. Alas, no such response has taken place… yet. Perhaps this offering will present another opportunity for an explanation as to why the Founders' "familiarity" with the lower common law "barrier" would trump the expressions of Publius authors Jay and Hamilton – as well as the observations of the Supreme Court in *Minor* – regarding the original intended meaning of the term "natural born Citizen" in Art. 2, § 1, Cl. 5 of the Constitution.

As an added "Final Jeopardy" question: Is the General Howe hypothetical wrong?

I'll wait.