

# The nbC “Two-Citizen Parents” Issue

by [Joseph DeMaio](#), ©2024

101

OF OUR NATIVE COUNTRY, ETC.

BOOK I.      The citizens are the members of the civil society; bound  
CHAP. XII. to this society by certain duties, and subject to its authority,  
§ 212. Cit- they equally participate in its advantages. The natives, or  
sens and natives. natural-born citizens, are those born in the country, of pa-  
rents who are citizens. As the society cannot exist and per-  
petuate itself otherwise than by the children of the citizens,  
those children naturally follow the condition of their fathers,  
and succeed to all their rights. The society is supposed to  
desire this, in consequence of what it owes to its own preser-  
vation; and it is presumed, as matter of course, that each  
citizen, on entering into society, reserves to his children the  
right of becoming members of it. The country of the fa-  
thers is therefore that of the children; and these become  
true citizens merely by their tacit consent. We shall soon  
see whether, on their coming to the years of discretion, they  
may renounce their right, and what they owe to the society  
in which they were born. I say, that, in order to be of the  
country, it is necessary that a person be born of a father who  
is a citizen; for, if he is born there of a foreigner, it will be  
[ 102 ] only the place of his birth, and not his country.  
§ 213. In-      The inhabitants, as distinguished from citizens, are fo-  
habitants. reigners, who are permitted to settle and stay in the country.  
Bound to the society by their residence, they are subject to

(May 5, 2024) — INTRODUCTION

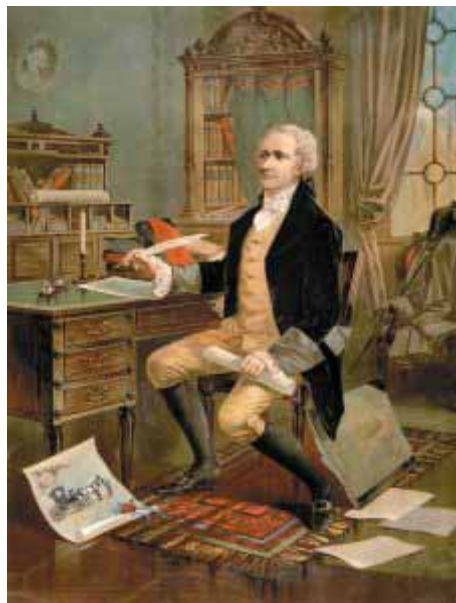
It is frequently argued by opponents of the “two-citizen parents” requirement of Emer de Vattel’s [definition](#) of a “natural born Citizen” (“nbC”) found in Book 1, Ch. 19, § 212 of *The Law of Nations* (1758), that the requirement “is nonsense.” Indeed, the 2015 [article](#) purporting to “resolve” the meaning of the nbC term (“C&K article”) by former high officials in the Department of Justice – Solicitor General Paul Clement and Acting Solicitor General Neal Katyal – completely rejects the relevance of the de Vattel nbC definition by *ignoring* any discussion of de Vattel or the definition in his 1758 treatise altogether. Ignoring facts, however, does nothing to eradicate them.

Instead, the C&K article deploys *ipse dixit* (“it is so because I *say* it is so”) to merely declare that “someone born to *a* [*i.e.*, singular] U.S. citizen parent generally becomes a U.S. citizen without regard to whether the birth takes place in Canada, the Canal Zone, or the continental United States...,” adding, cryptically, that “a ‘natural born Citizen’ means a citizen from birth with no need to go through naturalization proceedings.” (Emphasis added)

Stated otherwise, the C&K article announces, *ex cathedra*, that as long as “a” parent – in the singular – is a U.S. citizen, that alone will suffice to render the child born abroad to *that* parent a “citizen from birth with no need to go through naturalization proceedings [thereafter].” The C&K article then somersaults to the *non-sequitur* conclusion that therefore, purportedly, “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.*” (Emphasis added)

Stated otherwise, the C&K definition posits that, in addition to being seen as a 14<sup>th</sup> Amendment “citizen,” the person must *also* be recognized as fitting the definition of a “natural born Citizen” as intended by the Founders in Art. 2, § 1, Cl. 5 of the Constitution. Respectfully, your humble servant posits that this simplistic definition is unsupported by the history of the nbC provision and plainly *not* what the Founders intended or adopted in the Constitution. Accordingly, the C&K conclusion requires closer analysis.

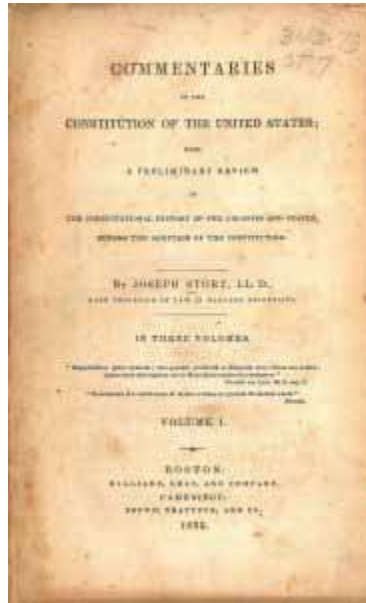
### **ANALYSIS: The Founders’ Concern**



*“Alexander Hamilton making the first draft of the Constitution for the United States 1787,” [public domain](#)*

First, it is an undisputed historical fact that in crafting the eligibility standards for the “Chief Magistracy” – the President –, the Founders sought to construct the highest practicable barrier to the potential for insinuation of “foreign influence” into the highest office of the new Republic. As admonished by Alexander Hamilton (one of the Publius triplets) in [Federalist 68](#): “Nothing was more to be desired, than that *every practicable obstacle* should be opposed to cabal, intrigue and corruption...,” (emphasis added) which acknowledged evils could arise “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)

While Hamilton was primarily addressing the concept and utility of the Electoral College in Federalist 68, his warning regarding the desire of foreign powers to “raise a creature of their own” to the presidency rings as true with respect to Art. 2, § 1, Cl. 5 today as it did in 1787.



([Public domain](#))

In fact, Hamilton’s warning was repeated and fortified by Supreme Court Associate Justice Joseph Story in his [Commentaries on the Constitution of the United States](#) (1853). There, in § 1473 – and addressing the nbC clause and the *exclusion* of foreigners as well as naturalized citizens from eligibility to the presidency – Justice Story states:

“It is indispensable, too, that the President should be a *natural born citizen* of the United States; or a citizen at the adoption of the constitution, and for fourteen years before his election. *This permission of a naturalized citizen to become President is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties.*” (Emphasis added).

Justice Story’s reference to the “permission of a naturalized citizen” provision refers to the exception embodied in the “Citizen-Grandfather” clause within Art. 2, § 1, Cl. 5, and without which the first seven presidents could not have constitutionally served. Justice Story then adds (*id.*) with regard to the wisdom and function of the Constitution’s exclusion of foreigners under the nbC clause the cogent observation that:

“[i]t cuts off *all chances* for ambitious foreigners, who might otherwise be intriguing for the office [of the President]; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.” (Emphasis added)

Plainly, Justice Story was echoing Hamilton’s admonition that *every* practicable obstacle – not just a few convenient ones – should be identified and interposed to preclude the insinuation of foreign influence into the presidency. Moreover, the Founders sought to exclude not only “foreigners,” as people, but “foreign *influence*” as well, whatever the source of that “influence.” Stated otherwise, Justice Story’s “all chances” and Hamilton’s “every practicable obstacle” observations mirror each other: each and every and *all* chances for the insinuation of foreign influence into the presidency were to be, as much as practicable, foreclosed.

More succinctly, “all” and “every” are terms expressing the same concept and objective. And parenthetically, the C&K “one-citizen-parent-is-sufficient” theory purports to extend its “rationale” without regard to the “happenstance” of actual birthplace, whether here in the United States or anywhere else on the planet. Your servant posits that this theory is precisely what the Founders sought to *preclude* when drafting the Constitution’s nbC Eligibility Clause.



“The Law of Nations” by Emmerich de Vattel ([public](#) domain)

### ANALYSIS: 2 citizen parents > 1 citizen parent

Second, if the exclusion of “all” and “every” potential for foreign influence was the goal of the Founders, one must ask: which definition of a “natural born Citizen” more closely aligns with their intent? Does the C&K definition – positing the need for only *one* parent to be a U.S. citizen – satisfy the nbC requirement? Or does the de Vattel § 212 definition, requiring *both* parents to be U.S. citizens when their child is born better address the Founders’ concerns and meet their goal of erecting the “highest practicable barrier” to foreign influence?

Rocket science, this is not: the latter, de Vattel § 212 definition interposes a much higher and thus better barrier than the C&K “one-parent-is-close-enough-for-government-work”

definition. There are several reasons for this conclusion, obvious to most, but obscure to others, even former high officials in the Solicitor General's Office.

To begin with, not only were the Founders intent on requiring that the president be a person of unquestioned fidelity and allegiance to the United States, they also demanded that such fidelity and allegiance be *sole and exclusive*. The goal was for the "Chief Magistrate" – the President – to be a person of undivided allegiance, *not* one of shared or dual allegiance.

A person born to parents, only one of whom is a U.S. citizen but the other is a foreigner – or even a dual-citizen foreigner – may be seen to have multiple allegiances. And even if the subject person renounces or disclaims such non-U.S. allegiances – as Senator Ted Cruz attempted – that does nothing to "undo" the national character of the person *when born*. This "when born" requirement was emphasized by John Jay in his July 25, 1787 "hint" [letter](#) to Constitutional Convention Chairman George Washington. There, Jay emphasized the importance of birth here by underscoring the term "born" when referencing the character of the person who would be the Commander in Chief of the "[A]merican army."

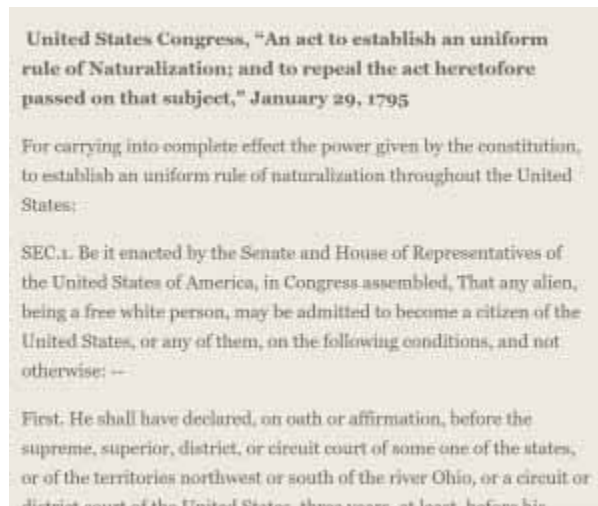
Stated otherwise, if the person *at birth* is born to two parents, with, say, only the mother being a U.S. citizen and the father being, say, a citizen of Jamaica, the father – or, for that matter even the nation of Jamaica *itself* – could in the future potentially claim that the child was at minimum of dual U.S. *and* Jamaican citizenship. Even if the child renounced its part-Jamaican citizenship, that would not preclude Jamaica from contending that, at birth, the child had dual U.S./Jamaican citizenship. And the same problems would exist, potentially even more complex, if the father possessed dual or even tri-national citizenship.

Many nations of the world in 1787, as well as today, subscribe to one or the other – and sometimes a blend of both – citizenship by blood or parentage (*jus sanguinis*) and citizenship by birthplace (*jus soli*). Moreover, would a future renunciation of Jamaican citizenship have any effect on the shared citizenship of the child, assuming, of course, that the child remained a "minor" at the time of the father's renunciation?

Under the de Vattel § 212 "two-citizen parents" definition, the myriad permutations, complications and debates over "sole," "undivided," "dual" and/or "shared" allegiance are rendered moot and eliminated. Additionally, in today's exponentially faster-paced world as compared to 1787, there would be no time to "sort out" or adjudicate the nuances of competing allegiance claims in court. It is far better that those debates be resolved at the outset, which is precisely what the § 212 definition does. Accordingly, the argument that the Founders would have consciously adopted a definition fraught with doubts, inconsistencies and uncertainties regarding *sole and exclusive* allegiance to the United States is both counter-intuitive as well as ill-reasoned.

## ANALYSIS: 1 Stat. 103 and 1 Stat. 414

Third, independently and in addition, the “two-citizen parents” definition was recognized by the First Congress in 1790 when it passed [1 Stat. 103](#). That statute, of course, asserted that “children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be *considered* as natural born citizens.” (Emphasis added) This language plainly contemplates that the “*citizens* of the United States” to which children are born if “beyond sea” are the parents – a plural-component union of a mother and a father – who are, at the time of the birth, *both* U.S. citizens.



1 Stat. 103, of course, was repealed – *not* “reenacted “in the same words” as erroneously claimed by Associate Justice Horace Gray in the [Wong Kim Ark](#) case (“WKA”) – less than five years later in January, 1795 by [1 Stat. 414](#).

The reason for the repeal was likely because the Congress realized that 1 Stat. 103 conflicted with the nbC definition of Art. 2, § 1, Cl. 5 (the presidential eligibility clause) and constituted a prohibited “ersatz” constitutional amendment via statute. This potential is discussed in a law review [article](#) which is cited with approval in the C&K article, “*Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*,” 36 Gonzaga Law Review 349, 372-73 (2000/01), by one Christina S. Lohman. Lohman states: “... *one could certainly posit that the [Congress] recognized a possible constitutional conflict and sought to correct it. Further, the omission of ‘natural-born’ makes the statute look more like one devolving citizenship by naturalization.*” (Emphasis and bolding added) See Lohman, **38 Gonz. L. Rev. at 372-373**.

1 Stat. 414 repealed the words “natural born” that had modified the immediately following term “citizen” in 1 Stat. 103, thus making such children “considered” to be “citizens,” but no longer “natural born citizens.” But aside from that issue, the Congress *preserved* its recognition that those children born “beyond sea” still had to be the product of *two* parental citizens in order to be even “considered” to be themselves “citizens.”

Had the Founders, many of whom were also members of the First Congress, intended that only *one* parent needed to be a U.S. citizen to bestow U.S. citizenship upon a child born beyond sea, it could easily have so stated. Instead, it used language compelling the conclusion that both parents – described as “*citizens*” in the plural – were required.

Indeed, the Lohman law review article – again, cited approvingly in the C&K article – states **with regard to the meaning of “natural born citizen” that “... the common law, at least with regard to foreign-born children, appears to contemplate *only children of two citizen parents.*” (Emphasis added) See Lohman, *id.*, at 368.** This, of course, was the thrust of 1 Stat. 103, even before its repeal in 1795 by 1 Stat. 414. Furthermore, no rational reason exists for differentiating between children born “here” as opposed to “beyond sea” insofar as the “two-citizen parents” requirement for an nbC is concerned.

This language, of course, parallels the definition in de Vattel’s § 212, where de Vattel defined, in French, natural born citizens in the plural as “ceux qui sont nés dans le pays, *de parens citoyens...*,” and in English, also plural, as “those who are born in the country of *citizen parents.*” (Emphasis added) This conclusion is further ratified upon recognition that in *both* 1 Stat. 103 and 1 Stat. 414, Congress separated the mother and father when conditioning the citizenship of the child born “beyond sea” to the parental union with the proviso that: “[T]he right of citizenship shall not descend to persons whose *fathers* have never been resident in the United States.” (Emphasis added)

That proviso, included in both 1 Stat. 103 and 1 Stat. 414, only fortifies the conclusion that the Founders considered the “two-citizen parents” definition in de Vattel’s § 212 to be the one creating a higher, rather than a lower, bar to the potential for the insinuation of foreign influence regarding the presidency.

Moreover, the fact that Congress in *both* 1 Stat. 103 and 1 Stat. 414 addressed the separate issue of the *father’s* residency in the United States as bearing upon the child’s citizenship confirms that Congress was aware of and took into consideration the principles of *both* birthplace or the “law of the soil” (“*jus soli*”) as well as parentage or bloodline (“*jus sanguinis*”) in determining the citizenship of children born to U.S. parents “beyond sea.”

## ANALYSIS: Senate Resolution 511 (2008)



<https://www.govtrack.us/congress/bills/110/sres511/text>

Fourth, further confirmation of the relevance of the “two-citizen parents” requirement is found in [Senate Resolution 511](#) (2008). That resolution – having, by the way, *zero* precedential weight on the eligibility topic – sought to validate the nbC eligibility in 2008 of Senator John McCain. According to the C&K article, the Senate purported to “define” the nbC term by incorporating the language of 1 Stat. 103.

Apart from the undisputed fact that 1 Stat. 103 was repealed *in toto* 213 years earlier – including its “considered as natural born citizens” language – the Senate blundered (including at the time Senators Barack Obama and Hillary Clinton) into asserting that Senator McCain was purportedly an eligible nbC *because*, among other things, he was “born to *American citizens* on an American military base in the Panama Canal Zone in 1936.” (Emphasis added)

Quite apart from the other factual anomalies existing in the resolution’s “Whereas” clauses, the factual reality that McCain was “born to American citizens...” seems clearly to confirm that the Senate was accepting and adopting the “two-citizen parents” requirement of 1 Stat. 103 and § 212 of the de Vattel treatise. Indeed, the Senate included in two of its “whereas” clauses the following:

“Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children *born to Americans* serving in the military nor to prevent those children from serving as their country’s President; [and]

“Whereas such limitations 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;*” (Emphasis added)

Where to start, where to start?

First, as discussed [here](#), the reliance on 1 Stat. 103 by S. Res. 511 – which law had been repealed over two centuries before the resolution was a twinkle in the eye of its sponsors, including Barack Hussein Obama II and Hillary (“BleachBit..., what BleachBit?”) Clinton – was garden-variety dumb. No one ever confused a U.S. Senator with a Nobel laureate.

Most likely because Congress realized in 1795 that 1 Stat. 103 improperly (*i.e.*, unconstitutionally) attempted to amend by a statute the constitutional restrictions of the nbC Eligibility Clause, it enacted 1 Stat. 414, **repealing** 1 Stat. 103. And as noted [here](#), the manifestly wrong conclusion of Supreme Court Associate Justice Horace Gray in the *WKA* case that 1 Stat 103 was “reenacted, in the same words...” by 1 Stat. 414, eviscerates the core rationale of S. Res. 511.

Second, the claim in the resolution that 1 Stat. 103 constituted “the First Congress’s own statute defining the term natural born Citizen...” is also clearly wrong. 1 Stat. 103 merely **categorized** certain people who were born “beyond sea” as being “considered as” natural born citizens, but provided **no** additional definition of the term. That said, both 1 Stat. 103 and the resolution again recognized that in any event, the birth “beyond sea” had to be to two American citizens, not just one.

Third, on a collateral but related point proving that in any event, the resolution was likely legally wrong, a law professor contended at the time that McCain became a U.S. citizen pursuant to a specific 1937 law granting citizenship to children born to **American parents** (plural) in the Panama Canal Zone after 1904. The law was adopted about one year after McCain was born there, but because it conferred citizenship after McCain’s birth, and because it was a naturalization statute, the professor [argued](#) (cogently) that McCain was not a natural born citizen.

Hah-vahdh law professor Laurence Tribe disagreed, and the Senate adopted Tribe’s opinion. Nonetheless, McCain lost. Recall as well that Tribe is the Hah-vahdh professor *emeritus* who assured everyone that there was **absolutely** no question that President Trump would be disqualified by the U.S. Supreme Court and excluded from the 2024 Colorado ballot as an “insurrectionist.” That did not happen. Ummm..., so how much does a law degree from Hah-vahdh now cost?

#### **ANALYSIS: *Minor v. Happersett***

Finally, further ratifying the conclusion that the Founders intended to adopt the “two-citizen parents” definition of § 212 as the nbC restriction in Art. 2, § 1, Cl. 5, is the Supreme Court’s unanimous decision in [Minor v. Happersett](#), 88 U.S. 162 (1875). There, the Court specifically stated (88 U.S. at 167-168):

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides† that “no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President,”‡ and that Congress shall have power “to establish a uniform rule of naturalization.” Thus new citizens may be born or they may be created by naturalization.

The 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

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\* Articles of Confederation, § 3, 1 Stat. at Large, 4.

† Article 2, § 1.

‡ Article 1, § 8.

“The 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 and bolding added)

The unambiguous import of the Court’s words is clear: if a child was born to *two* U.S. citizen parents within the jurisdiction, the child was an nbC. If the child was born to parents *other* than both being U.S. citizens, there were “doubts” as to the child’s status as a “citizen,” whether “natural born” or not.

If the Founders had the objective of erecting in their new Constitution a 100% impenetrable barrier – rather than a 50%, or a 75% barrier or even a 99% barrier – against the insinuation into the presidency of “foreign influence” as warned by Hamilton in Federalist 68 and repeated by Justice Story in his treatise, is it more likely that they would have selected: (a) a high barrier requiring both birth “in” the nation (*jus soli*) coupled with the requirement that the birth be to *two* parents who were already its citizens (*jus sanguinis*) as known from § 212 and as to which barrier there have *never*

been any doubts, as noted in *Minor*; *or* (b) a lower barrier *not* requiring birth “in” the nation and without regard to whether one, both or neither of the parents were citizens and as to which “there have been doubts”? This is not a difficult question.

Moreover, the fact that the *Minor* decision was abrogated, but *not* overruled, by the 19<sup>th</sup> Amendment – after being allowed to remain “the law” for 45 years until 1920 regarding the issue of women’s’ suffrage rights – has *zero* effect on the Court’s recognition that the Founders understood the term “natural born” to be that articulated in § 212, and had “no doubts” about it, instead of a definition like the C&K theory, as to which there “have been doubts.”

That recognition remains the same today as it was in 1875. And even if, as “de Vattel Deniers” claim, the recognition is deemed to be “dictum,” it is *judicial dictum* binding on lower courts to this day rather than *obiter dictum* having no precedential weight. In addition, it is manifestly counter-intuitive to posit that the Founders would have intended to adopt a definition of an nbC which was burdened with “doubts” when the de Vattel § 212 definition, bereft of any such doubts, was available.

The C&K theory espousing that place of birth is a mere “happenstance” rather than a “requirement” and that only one parent need be a U.S. citizen at the time of birth runs counter to all historical evidence that the Founders would have purportedly adopted that theory. Instead, all historical evidence points to the Founders’ acceptance and adoption of the nbC definition found in § 212 requiring as a *sine qua non* of the definition a birth to “*parens citoyens*” (emphasis added), or in English: “citizen *parents*.” For the grammatically impaired: “parents” denotes *more* than one.

## CONCLUSION



There is no historical evidence or logical argument that the Founders, many of whom served in the First Congress, harbored a “one-U.S.-citizen-parent-is-good-enough-for-the-presidency” theory to define an nbC for purposes of Art. 2, § 1, Cl. 5. In point of fact, there is abundant evidence that they favored, and thus adopted, the more restrictive, de Vattel § 212 definition of an nbC, including its “two-citizen-parents” requirement.

On the other hand, if competent contrary historical or logical evidence exists, your humble servant would be pleased to receive it, as it may assist in resolving these questions which the Supreme Court persists in [“evading.”](#)

Distilled to its essence, the “two-citizen-parents” requirement embedded in the de Vattel § 212 definition presents a much higher – and thus preferred – barrier to the potential for insinuation of foreign influence into the presidency than does the C&K “one-citizen-parent” (birthplace aside) alternative. The contention that the Founders would have intentionally adopted the lower, inferior definition is, to state the matter politely, unsupported and, respectfully, intellectually unsupportable.