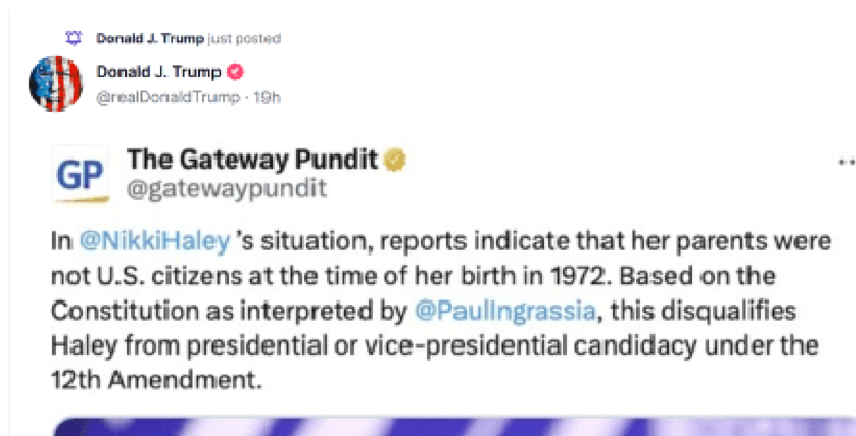
Who Can Handle the nbC Eligibility Truth?

by Joseph DeMaio, ©2024

(Jan. 14, 2024) — **Introduction**



https://truthsocial.com/@realDonaldTrump

As interest continues to once again pick up in the presidential eligibility issue following President Trump's post suggesting that Nikki Haley might not be a "natural born Citizen" ("nbC"), and thus ineligible, some interesting reactions and observations have surfaced. In this offering, your humble servant will address some of those new items. And reader fair warning alert: this post is long…., but, if you have gotten this far past the title, arguably well worth reading.

As a preliminary matter, readers not already familiar with the topic may find it useful to first review some of the prior postings here at *The P&E* on the nbC issue. Those postings include many by, among others, nbC warriors CDR Charles Kerchner (Ret) and Robert Laity; the intrepid *P&E* Editor, Sharon Rondeau; and, yes, your humble servant.

Those posts may be generally summarized as positing that in 1787, when the Founders were drafting the Constitution, one of their primary concerns was ensuring that the "chief magistracy" of the new Republic – the President and the Office of the Presidency – be protected and insulated against "foreign influence." Their concern and trepidation manifested its existence in the July 25, 1787 "hint" letter from Founder John Jay to the Constitutional Convention Chairman, George Washington.

There, Jay respectfully suggested that the presidency be restricted to a "natural born Citizen," with Jay both underscoring the word "born" and capitalizing the "C" in "Citizen." Significantly, Jay used the term "Citizen" instead of the term "subject" as some would argue the Founders, purportedly, treated as synonyms. Memo to file: no, they didn't.

Nothing 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 aproaches 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? But the convention have guarded against all danger of this sort with the most provident and judicious attention. They have not made the appointment of the president to depend on any[8] pre-existing

https://founders.archives.gov/documents/Hamilton/01-04-02-0218

As Founder Alexander Hamilton noted in *Federalist 68*, the Founders viewed the dangers inherent in allowing the insinuation of foreign influence into the presidency as being real and in need of being blocked. The goal was to restrict the presidency, as much as possible, to persons of undivided loyalty and allegiance to the United States…, and the United States ***alone.*** In John Jay's mind, that meant a "natural born Citizen."

Hamilton warned that the potential for such foreign influence danger arose "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). Reduced to its essence, the Founders' objective was to shield and vigorously protect from the outset the "chief magistracy" from that danger.

The term in 1787 defining the highest barrier to the insinuation of foreign influence into the presidency as intended by the Founders was found in § 212, Book 1, Ch. 19 of the 1758 treatise "*The Law of Nations*" by Swiss attorney, jurist and scholar Emer de Vattel. There, de Vattel defined a "natural born citizen" as a person born in a country to two parents who were, at that time, already citizens of that country.

101 OF OUR NATIVE COUNTRY, ETC.

BOOK I. CHAP. XIX. § 212. Citizens and natives.

The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate 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 preservation; 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 fathers 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. Inhabitants.

The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country.

https://ia804506.us.archive.org/0/items/good-copy-de-vattel-the-law-of-nations/_%20%2A%20Good%20Copy%20-%20De%20Vattel%20-%20The%20Law%20of%20Nations.pdf

Any other definition ascribed to the nbC term – including, for example, a person who might merely be a "native-born citizen" or a "citizen at or by birth," regardless of ***both*** parents' citizenship status and apart from any need for future validating "naturalization proceedings" – establishes a lower, inferior and more easily cleared barrier to the danger sought to be prevented.

Accordingly, it makes ***no*** sense to haughtily and shamelessly suggest, as some these days do, that the Founders would have consciously adopted a ***lower*** definitional barrier against foreign influence when a known and available ***higher*** barrier – the de Vattel § 212 definitional barrier – existed. Yet this is the rote, faux marinade in which peoples' minds have been soaked for years.

Stated otherwise, it is undisputed that the Founders feared the potential for the insinuation of foreign influence into the presidency and that in response, they sought to prevent that possibility by selecting and adopting a term setting a high barrier against that danger. To repeat, the highest available barrier in 1787 to that potential was found in the § 212 definition of a "natural born citizen" articulated by Emer de Vattel in his treatise.

That treatise, by the way, was available to and possessed by the Founders, both in French, the international language of diplomacy at the time, as well as English in the form of a 1760 translation published in London. Moreover, the continuing vitality and authority of de Vattel and the principles set out in his tome over the years since 1787 have been repeatedly confirmed by the U.S. Supreme Court, including as recently as 2023. *See*, *e.g.*, *Haadland v. Brackeen*, 599 U.S. 255, 308-309 (2023); *Franchise Tax Board of California v. Hyatt*, 587 U.S. __, 139 S. Ct. 1485, 1493 (2019); and *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, n.12 (1977).

While some might argue that de Vattel and the principles contained in his treatise were irrelevant and completely unknown to the Founders as they drafted the Constitution, the foregoing Supreme Court decisions confirm just the opposite.

The Reactions to the Trump Post

Against this backdrop, and turning to some additional comments being made regarding President Trump's post, beyond those made in the *New York Post* already addressed here, that paragon of objective reporting – NBC…, just kidding… – has coughed this up: Trump promotes 'totally baseless' birther conspiracy theory against Nikki Haley (nbcnews.com).

The Tribe and Vance Comments

In the NBC article, authors Vaughn Hillyard (a political reporter for NBC News) and Amanda Terkel (politics managing editor for NBC News Digital) reference Ha-vahdh emeritus law professor Laurence Tribe. They quote him as claiming that the argument that Haley is ineligible is "totally baseless as a legal and constitutional matter" and criticizing President Trump's post as potentially being the playing of the "race card against the former governor and UN ambassador as a woman of color."

Nonsense. The nbC issue has absolutely ***nothing*** to do with race or gender. It has ***everything*** to do with foreign nationality, foreign claims of allegiance or dual loyalties and the intention of the

Founders to protect the presidency from the insinuation of foreign influence, regardless of ethnicity, gender…, or even personal pronoun preferences.

Joyce White Vance (public domain)

Indeed, the article even quotes another lawyer, former U.S. Attorney Joyce Vance – a Barack Hussein Obama, Jr. appointee and now an MSNBC columnist – conceding that, Mr. Trump's post aside, "nonetheless, the question of the [definition of the] term 'natural born citizen' *has **not** been fully fleshed out in the courts*…." (Emphasis added). This admission would seem clearly to put to rest the misinformation that the matter is "settled" and that those tinfoil hat "birthers" should just "give it a rest." Memo to file # 2: your servant is not gonna "give it a rest" here at *The P&E.*

This correct admission by Vance plainly undermines Professor Tribe's categorical decree that the issue is "totally baseless." Moreover, it underscores that which your humble servant has argued for years: the Supreme Court – the only one that counts in the final adjudication of the Constitution's terms – has not rendered any decision in the past directly addressing the nbC issue in the context of a president or vice-president where the issue arises in a "ripe" case or controversy involving parties with legal "standing." Unless such a decision emerges or a constitutional amendment either ratifying the de Vattel definition or repealing the nbC clause altogether is passed and ratified by the states, the debate will continue.

The Neuborne Comment

The NBC article also quotes another former law professor, one Burt Neuborne, a professor emeritus at New York University Law School and the founding legal director of the Brennan Center for Justice. Neuborne "jokingly" quipped that "[s]omeone should tell him [Trump] that the North won" the Civil War. This comment merits closer scrutiny. Translation: the following section is long, so keep your favorite caffeinated beverage nearby.

First, the quip seems to confirm that the retired law professor thinks the 14th Amendment – passed after "the North won the Civil War" to ensure that black Americans were accorded the

same citizenship rights as all other ***native-born citizens***…, but not mentioning any intent to alter the separate eligibility restrictions of Art. 2, § 1, Cl. 5 – controls the issue.

Memo to file # 3: it does not, as all of the debates and colloquies between and among the congressmen voting on it demonstrate, including the prime sponsor and author of the bill creating the amendment, John Bingham (R. OH).

On April 11, 1862, when the 14th Amendment was but a future glimmer in his eye, Bingham rose on the House floor in support of such a proposed amendment. *See Congressional Globe,* House of Representatives, 37th Congress, 2nd Session at p. 1639. During his remarks to the assembled Representatives addressing the concept of citizens and citizenship, he specifically identified the persons to whom the proposed amendment would apply thusly:

"There is no such word as ["]white["] in your Constitution. Citizenship, therefore, does not depend upon complexion any more than it depends upon the rights of election or of office. All from other lands, who, by the terms of your laws and a compliance with their provisions become naturalized, are adopted citizens of the United States; *all **other** persons born within the Republic, **of parents owing allegiance to no other sovereignty, are natural-born citizens.***" (Emphasis added)

1862. THE CONGRESSIONAL GLOBE. 1639

District of Columbia, will faithfully execute their great trust, and declare by law that hereafter, in all the coming future, no American citizen nor human being shall, within the limits of this District, "be deprived of life or liberty or property without due process of law." That, sir, is the question, the great question of this day and hour.

I have said that these persons who are the subject-matter of this legislation were natural-born citizens of the Republic. Shall we hesitate, can we hesitate, within the admitted limits of our power, to do justice to our own citizens by the enactment of this law? I regret, although I do not propose to make any change in the text of the bill, that it was so carefully worded as to say that, "all persons held to service or labor within the District of Columbia by reason of African descent." I would have preferred if the bill had declared that "all American citizens held to service or labor within the District of Columbia by reason of African descent are hereby discharged and forever freed from such servitude."

We are not to be cheated by the tests of citizenship that are sometimes set up touching the elective franchise and eligibility to office. It is too late in the day for any American statesman to undertake to demonstrate that none are citizens of the United States save those entitled to the elective franchise or to the exercise of the functions of office. I stand here to assert the proposition that, by the decision of every State and Federal court in the country, more than one half the white population of the United States who are excluded from the exercise of the elective franchise, and from all civil offices, are citizens of the United States. I undertake to say, by the decision of your Federal tribunals, that women—that all the women of this Republic born upon the soil—are citizens of the United States, though neither entitled to vote nor to hold civil office. All the native-born women and children of the land, though not entitled to vote nor eligible to civil office are citizens of the United States within the judiciary act of 1789, and within the Constitution of the legislation with that question; we have no power whatever over it. The right to vote does not involve the right to citizenship. Neither are the rights of men or citizens to protection under the law dependent upon the right of suffrage in them. Are not children natural-born citizens of the United States? Are not they entitled to protection as citizens everywhere in all the States of the Union? Does not the Constitution provide that the citizens of each State, being ipso facto citizens of the United States, shall be entitled to all privileges and immunities of citizens in the several States; and does not that apply to the minor citizens of the United States as well as to the major citizens of the United States? It is not the privilege to vote that is thus guarantied to all citizens of the United States. The Constitution does not read, as I have heard it quoted upon this floor, that the citizens of each State should be entitled to the privileges and immunities of citizens of the several States. No, sir, the word used in the Constitution in this clause is not *of*, but *in*, the several States. "All privileges and immunities of citizens of the United States in the several States," is what is guarantied by the Constitution. There is an ellipsis in the Constitution, as gentlemen doubtless know, which must be supplied to express clearly its meaning. The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law.

Mr. WICKLIFFE. But what civil political right does the State of Ohio give to the black man? Does it allow him to vote? Does it allow him to intermarry with the whites?

Mr. BINGHAM. The gentleman would get a full and satisfactory answer to his question if he would read the statutes of Ohio.

Mr. WICKLIFFE. I have read them.

Mr. BINGHAM. If he has read them, then the gentleman from Kentucky knows that, among other things, the laws of Ohio fully provide for the protection of the right of every citizen of the United States, whether black or white, male or female, old or young, man or child—that is, that the elective franchise, and had a voice in the adoption of your Constitution. To this day they hold and enjoy that right in several of the States of the Republic. You cannot, as Federal legislators, prevent the exercise of this right by the colored citizens; you cannot help it. The old Bay State, true to her sacred, her immortal traditions, recollecting that her soil is holy ground, marked with the footprints of the apostles and martyrs of civil and religious liberty, has held to her ancient faith that rights, even political rights, are inseparable from manhood and citizenship, and in no wise dependent upon complexion or the accident of birth. I trust in God whatever States may falter, Massachusetts may continue in the ancient ways forever more. Taxation without representation once stirred the American people like the blast of a trumpet; rather than submit to it they proclaimed resistance unto death. In the purer and better days of the Republic, taxation only with representation, was the very sign under which the Jeffersonian Democracy were wont to conquer. Still, I concede that all political rights must be controlled by the majority.

If there were anything in the argument constantly reiterated here and elsewhere, about human rights being dependent on and confined to those who enjoy political rights, you might as well go back at once to the civil polity and civilization of the pagan world, and assert that none but those who have a voice in the State have a right to be free; that your wives and mothers and daughters, because they have no voice in the legislative councils or in the elections of States, are not to be considered as invested with the rights of citizenship or the sacred rights of human nature. That is not the lesson learned by those who made and who transmitted to us the Constitution of the United States. They found out and adopted a wiser, juster, and better polity than pagan ever knew. They learned it from the simple but profound teachings of Him who went about doing good; who was no respecter of persons, who made the distant land of his nativity forever sacred to mankind, and whose [illegible] majesty over the manger and the straw, and took from the cross its shame and [illegible].

[illegible]s://memory.loc.gov/ll/llcg/059/0600/06811639.tif

Then, some four years later, on March 9, 1866, less than one year following the end of the Civil War, Bingham rose again on the floor of the House. This time he addressed his assembled colleagues on a Senate bill (S. 61) entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their vindication" forwarded to the House for action. Congressman Bingham again articulated his recognition of the distinction between "citizens" and "natural born citizens" thusly:

"I find no fault with the introductory clause, which is simply declaratory of what is written in the Constitution, that every human being born within the jurisdiction of the United States ***of parents***

not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural-born citizen*….*" (Emphasis added) *See Congressional Globe*, House of Representatives, 39th Congress, 1st Session at p. 1291.

1866. THE CONGRESSIONAL GLOBE. 1291

The significance of Representative Bingham's remarks in 1866 lies in his reference to the term "natural-born citizen" as being found "*in the language of [the] Constitution itself*." (Emphasis added) The ***only*** place in the Constitution where the term "natural-born Citizen" is found is Art. 2, § 1, Cl. 5, the Presidential Eligibility Clause. The term appears nowhere else in that founding document.

It is – or should be to logical minds – abundantly clear, therefore, that Mr. Bingham was ***not*** referring to a term he had accidentally come across elsewhere. Plainly, Congressman Bingham's understanding of the term "natural born citizen" when he was identifying persons included within that ***subset*** of the "citizens" to be covered by his proposed constitutional amendment was grounded in the term appearing in the Constitution's Eligibility Clause, Art. 2, § 1, Cl. 5. That "subset" of persons included those who were born here to "*parents not owing allegiance to any foreign sovereignty…," or, simply stated, "two U.S. citizen parents.*"

As noted many times in the past, think Venn diagrams: all natural born Citizens are also native born citizens, but not all native born citizens are natural born citizens. While the 14th Amendment creates native-born citizens, it does ***not*** create natural born citizens.

United States Constitution

Article II, Section 1, Clause 5:

"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; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."

https://constitution.congress.gov/constitution/article-2/

Bingham recognized that the "language of the Constitution itself" meant that, insofar as eligibility to the presidency was concerned, an nbC was a person born here to parents who were already citizens of the United States since, by definition, U.S. citizen parents are those who do not owe "allegiance to any foreign sovereignty." That is why the Eligibility Clause itself differentiates between "citizens" for "citizen-grandfather clause" purposes and "natural born Citizens" for Presidential eligibility purposes. Rocket science, this is not.

Therefore, to paraphrase Professor Neuborne, someone should tell him that although a 14th Amendment "citizen at/by birth" sufficiently defines a "native-born citizen," it does not suffice to define or create a "natural born Citizen," at least insofar as the Founders were concerned when placing the nbC term into Art. 2, § 1, Cl. 5.

The Salon Comment

Apart from the NBC reaction to President Trump's post, the left-leaning magazine *Salon* also chimed in with an article by one Gabriella Ferrigine, described as a "news fellow" at *Salon*. The use of the gender-specific masculine term "fellow" at the *Salon* website is problematic, unless, of course, "Gabriella" is "transitioning."

There is little to add with regard to the *Salon* article as it reads very much like the NBC article which was published one day earlier. No, Virginia, the *Salon* article does not appear to have been plagiarized, but the passages from Laurence Tribe and Joyce Vance, properly signaled with quotation marks, are included. One major difference is that the *Salon* article omits any mention or discussion of the views of Professor Neuborne which are included in the NBC article. And because this post is already long, your servant's observations about the NBC article are simply incorporated here in similar response to the *Salon* article.

Conclusion

The bottom line here is that three major news outlets – *The New York Post* (conservative); NBC (not conservative) and *Salon* (***really*** not conservative)…, to name but a few… – have all come out against President Trump's post, a post having the ***audacity*** to suggest that the rote narrative that has permeated peoples' brains for over a decade might, after all, be misinformation. The problem with the marinating fluid is that it is a toxic brew consisting of manufactured racism; xenophobia; misogyny; discrimination; misinformation; ellipsis chicanery…; and garden-variety ignorance.

If, as former U.S. Attorney Joyce Vance admits, the nbC issue "has not been fully fleshed out in the courts…," it is at bare minimum premature, if not plainly foolish, for "journalists" and purportedly esteemed professors of law to spout contrary nonsense.

For Professor Tribe to assert that President Trump's suggestion regarding Nikki Haley's claimed nbC status is "totally baseless as a legal and constitutional matter" or for Mr. Neuborne to joke that "someone ought to tell Mr. Trump that the North won [the Civil War]" telegraphs the trivialization of a significant and ***unsettled*** question of constitutional law. Professorial bad form, even for professors emeritus.

Prof. Laurence Tribe (Wikimedia Commons, CC by 3.0)

Yet lampooning and trivializing the issue as being "over and done with" and ready for a "fork to be stuck in it" has been the core of the narrative. That marinade has for too long consisted of faulty logic and unsupported, erroneous assertions regarding the history of congressional legislation on the nbC definition.

Most disturbingly, the marinade has included a bitter spice extract. That extract is the ellipsis omission of the words of a Supreme Court case having the effect of making it appear that the Court has ***already*** ruled that a son born to a mother and father who were, purportedly, foreigners at his birth – a manifestly false conclusion – was nonetheless eligible to the presidency. Oh…, and then…, after Barack Obama's second term in office, reversing and erasing the ellipsis, ***eradicating*** any trace of the prior linguistic tort…, like it never happened, discussed here. As Sherlock Holmes noted: "The perfect crime is the one that is never discovered."

The nbC issue remains alive here at *The P&E* and neither Paul Ingrassisa – author of the article precipitating Mr. Trump's post – nor "45" himself should throw in the towel. In fact, they might consider – figuratively, of course – soaking a towel, wringing it out, then snapping it at the posteriors of those who "can't handle the truth."