# A Brief for Governor Romney's Eligibility for President

By Eustace Seligman

This is a reply to an article by Isidor Blum which appeared in the NEW YORK LAW JOURNAL on October 16 and 17 and which contends that Governor George Romney of Michigan is not eligible to be President. This article takes the contrary position. It relies upon the legal principle set forth by Hackworth in his Digest of International Law, Volume III, Chapter IX, page 2: "Nationality may be acquired by birth or by naturalization. Nationality at birth may result from birth in a territory of the state, jure soli, or from birth outside of the territory of the state to parents who are nationals of the state-- referred to as nationality by blood, or jure sanguinis" and establishes that a natural born citizen means a citizen by birth of either category and is not limited to one born in the United States. Since Governor Romney was a United States citizen by blood from birth, he is a natural born citizen and therefore eligible to be President.

## I

## Preliminary

The constitution in Article II, section 1, clause 5, reads as follows:

"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."

On the date of Governor Romney's birth, the law in effect with respect to the children of citizens born outside of the United States was section 1993 of the Revised Statutes of the United States, which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Governor Romney's father, Gaskell Romney, was a citizen of the United States who had been born in 1869 and had resided in the United States until 1884 when he was taken by his parents to Mexico. While there he maintained his citizenship, and

in 1895 he married. Governor Romney, his fourth child, was born in Mexico on July 8, 1907; he came to the United States in 1912 and has continued to reside here. In 1926 he had his first passport issued by the State Department upon the basis of affidavits setting forth the above facts.

## II

### The meaning of the term "natural born citizen"

The authorities define the term "natural born citizen" as one who is a citizen from birth:

The word "natural" is defined as "being such by nature" or "born such" and an example is "a natural fool" (The Random House Dictionary, p. 952, 21; The American College Dictionary, p. 809, 22).

The word "natural" is defined in the Oxford Dictionary (Vol. VI, p.38) as being "present by nature; innate" and also as a "native of a place or country," but notes that the latter is obsolete, having been common in 1580-1650.

The term "natural born" is defined in the Oxford Dictionary as: "having a specified position or character by birth; used esp. with subject" (Vol. VI, p. 38).

The term "natural born" is defined in Webster's Dictionary as "having a certain status or character by birth-- as natural born citizen, genius."

Ballantine's Law Dictionary defines the term "natural born citizen" as:

"A citizen by birth, as distinguished from a citizen who has been naturalized."

Dicey gives the following definition of the term:

"(2) A British subject must be either (a) a person who is or becomes a British subject on and from the day of his birth, and is called a natural-born British subject; or (b) a person who becomes a British subject at some day later than the day of his birth, i.e., who is not a natural-born British subject" (Dicey, Conflict of Laws, 5th ed., 1932, p. 142).

Frederick Van Dyne, Assistant Solicitor of the Department of State, makes the following statement:

"A child who acquires American citizenship by birth to an American father abroad, under Rev. Stat., sec. 1993 (U.S. Comp. Stat. 1901, p. 1268), is a natural-

born citizen of the United States" (Van Dyne, Citizenship of the United States, 1904, p. 50).

In Roa v. Collector of Customs (23 Philippine Rep. 315, 332, 1912) the court says:

"A natural born American citizen or Spanish subject means an American citizen or Spanish subject who has become such at the moment of his birth."

## III

### The meaning of the term at the time of the adoption of the Constitution

In ascertaining the meaning of the term "natural-born citizen" as used in the Constitution of the United States it is, of course, important to examine the meaning of that term as used prior to the adoption of the constitution in 1789.

It is well settled that the term "natural born" citizen (or subject) included not only all those born within the territorial limits of England or of the Colonies but likewise all those who were citizens at birth, wherever their birthplaces might be.

Blackstone's Commentaries, 12th edition, 1793, in Volume I, chapter 10, refers to the general rule that "Natural born subjects are such as are born within the domains of the crown of England…" and, after pointing out that there are certain exceptions, he then goes on to state: "…To encourage also foreign commerce, it was enacted by statute 25, Edw. III, st. 2, that all children born abroad, provide both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and, accordingly it has been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception: unless their said fathers were attainted, or banished beyond sea, for high treason: or were then in the service of a prince at enmity with Great Britain" (373).

The English statutes referred to by Blackstone all are alike in stating that the foreign born children coming within them *are* natural born subjects. See, for example, the Act of 1677, 29 Car. 2. c. 6, which states that the children coming within it "are declared to be and to have been the King's natural born subjects of this kingdom." Similarly, in the last statute passed before the adoption of the constitution dealing with this subject, the Act of 1773, 13 Geo. 3. c. 21, the same phrase "declared to be natural born subjects of the Crown of Great Britain" is used.

These statutes made clear that natural born subjects meant persons who were subjects from birth.

"In no case did the statutes read that the foreign born child would be entitled to the same rights as those of a subject born in Britain; what they said was that he *was* a natural born subject, i.e., a subject from birth just as was a subject born in Britain."

It follows necessarily from this that at the time of the adoption of the constitution the meaning in Great Britain of the words "natural born" subject was one who was born a subject whether (a) by birth in Great Britain or (b) by birth outside but of parents defined in the applicable statute. This being the meaning of the term in Great Britain it must be presumed to be the meaning intended to be given to it in the constitution.

It is the contention of Mr. Blum that since foreign born children become subjects as a result of statutory enactment and not by common law, and since British statutes were not adopted in the United States but only the common law, therefore the term "natural born citizen" in the constitution was limited to those who were born in the United States. There is no basis for this conclusion. No question of adoption of the British statutes is involved; they merely are relied upon to establish that the term "natural born citizen (subject)" meant at the time, in Great Britain, anyone who was a citizen (subject) from birth, whether by virtue of birth within the country under common law or by parentage when so provided by statute.

The term when used by the draftsmen of the constitution was surely intended to have the same meaning. That they so intended is confirmed by the fact that the Nationality Act enacted by the First Congress in 1790 contained among other matters the following provision:

"And the 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: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States:…"

This statute is a convincing contemporary construction of the phrase "natural born citizen" and demonstrates that the term in the constitution was not limited to persons born in the United States.

On January 29, 1795, the Nationality Act of 1790 was substantially rewritten and Congress put into one section a provision concerning two categories, one dealing

with children of naturalized citizens and the other dealing with foreign born children of citizens, reading as follows:

"And be it further enacted, That the children of persons naturalized dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization; and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, *shall be considered as citizens of the United States:* Provided, that the right of citizenship shall not descend to persons, whose fathers have never resided in the United States."

It should be noted that in the clause italicized the words "natural born" have been omitted. This was rendered necessary because the clause applied to both categories, one of which dealt with children of naturalized citizens who were not citizens at birth and therefore could not be described as natural born citizens. This omission in no way implied that the children in the other category who were citizens at birth were not properly described as natural born citizens as had been done in the 1790 act.

## IV

### The construction given to the term "natural born citizen" in the Constitution

There is no case involving the eligibility to the office of President under Article II of the constitution.

Nor is there any record of any debate or discussion in the Convention of 1787 bearing on the meaning of the term.

In the first draft of Article II, section 1, clause 5, the word "citizen" was used, which was later changed to "natural born citizen," but no reason for the change is known.

However, in Farrand's Records of the Federal Government of 1787, Volume III, at page 61, sets forth a letter written by John Jay to George Washington on July 25, 1787, containing the following:

"Permit me to hint whether it would be wise and reasonable to provide a strong check to the admission of foreigners into the Administration of our National Government, and to declare expressly that the commander in chief of the American Army shall not be given to, nor devolve on, any but a natural-born citizen."

The contrasting use in this letter of words "foreigners" and "natural-born citizens" indicated that Jay sought to exclude both aliens and also naturalized

citizens who had been aliens prior to becoming citizens, but not citizens who had been such from birth and who never had been aliens. It thus confirms the meaning of natural born citizen herein set forth.

The question was considered by Professor Alexander Porter Morse, one of the foremost legal authorities on American citizenship, in an article written in 1904 in 66 Albany Law Journal, at page 99, which concludes as follows:

"After some consideration of the history of the times, of the relation of the provision to the subject matter and of the acts of Congress relating to citizenship, it seems clear to the undersigned that such persons (children of citizens of the United States born at sea or in foreign territory) are natural born, that is, citizens by origin; and that if otherwise qualified, they are eligible to the office of President."

In this article Professor Morse emphasizes that the Act of 1790: "followed closely the various parliamentary statutes of Great Britain; and its language in this relation indicates that the first Congress entertained and declared the opinion that children of American parentage, wherever born, were within the constitutional designation of 'Natural-born citizens.' "

Willoughby, in United States Constitutional Law, volume 1, at page 354, states:

"Natural-born citizens not yet defined. So far as the author knows, no fully satisfactory definition of the term 'natural born citizen' has yet been given by the Supreme Court. Thus, it is not certain whether a person born abroad of American citizens who have themselves resided in the United States is to be deemed a natural-born citizen or a citizen naturalized by Act of Congress which provides that such persons shall be deemed to be citizens of the United States. To the author *it would seem reasonable to hold that anyone who is able to claim United States citizenship without prior declaration upon his part of a desire to obtain such a status should be deemed a natural-born citizen.* If this doctrine should be accepted, persons born abroad of parents themselves citizens would not be regarded as natural-born citizens, because, in fact, it is provided by Act of Congress of March 2, 1907 (34 Stat. 1229) that such persons, in order to receive the protection of the United States are required, upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and, moreover, are required to take the oath of allegiance to the United States upon attaining their majority."

The statement in the above quotation as to the 1907 is incorrect in that the requirements to register at an American Consulate and to take an oath of

Allegiance, applies only to children "who continue to reside out of the United States" until reaching the age of eighteen. Governor Romney came to the United States at the age of five and consequently it was not necessary for him to register or take an oath of allegiance and a passport was issued to him without his having taken such action.

Furthermore, even if he had continued to reside abroad until eighteen and had failed upon reaching the age of eighteen to register at an American Consulate, it would not have affected his citizenship.

See Rueff v. Bromwell, 116 Fed. Supp. 298, at 305):

"It should be noted that even under this section the failure of a citizen to comply with its provisions will deprive him of his right to diplomatic protection but will not deprive him of his citizenship."

Accordingly, under the doctrine laid down by Willoughby in the words italicized above, Governor Romney is a natural born citizen.

Professor Blum in his article argues that "natural born citizen is synonymous with "native born citizen" and is therefore limited to those who are natives, i.e., born in the United States. No evidence is advanced in support of this contention with the exception of the fact that one of the various meanings given to "natural" in the Oxford Dictionary is "native." However, the answer to this contention is that this dictionary also defines "natural" as "present by nature," and there is no justification in selecting one meaning to the exclusion of the other, and further that as set forth under I above, it defines "natural born" as "having a specified position or character by birth" and hence as including, but not limited to, native born.

## V

### Foreign born children of citizens are not naturalized citizens

There is a dictum in the opinion of Mr. Justice Gray in United States v. Wong Kim Ark (169 U.S. 649, 1898) which is inconsistent with the definition of "natural born citizen" above set forth. It describes foreign born children of citizens as naturalized, as follows:

"A person born out of the jurisdiction of the United States can only become a citizen by being naturalized either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress exercised by declaring certain classes

of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens or …" (702).

The actual decision in this case was that a child born in the United States, whose parents were subjects of the Emperor of China, became at the time of his birth a citizen of the United States.

This dictum in the Wong case has led to decisions holding that a foreign born child was a naturalized citizen within the meaning of an expatriation statute (Schaufus v. Attorney General, 45 Fed. Supp. 61, 1962, and Zimmer v. Acheson, 191 Fed. 2d 209, 1951). It has also led to a repetition of the dictum in one case (United States v. Perkins, 17 Fed. Supp. 177). This case held that, when at the date of birth abroad the parents were aliens but afterwards the mother was repatriated, the child was not a citizen at birth but a naturalized citizen, and that a certificate of derivative citizenship should be issued to him. The court then went on to say by way of dictum that even if his mother had been an American at his birth, he would still have been a naturalized citizen.

It is believed that the dictum in the Wong case and the cases based on it is incorrect and that such foreign born citizens are not properly described as "naturalized" citizens and that the term is applicable only to persons who have been previously aliens.

Professor Corwin, in The President, Office and Powers, at page 32, in a carefully reasoned discussion of the question, explains why he does not agree with the dictum: "But who are 'natural born citizens'? By the so called jure soli, which comes from the common law, the term is confined to persons born on the soil of a country, and this rule is recognized by the opening clause of the Fourteenth Amendment, which declares to be citizens of the United States 'all persons born or naturalized within the United States and subject to the jurisdiction thereof.' On the other hand, by the so-called jure sanguinis, which underlay early Germanic law and today prevails on the Continent of Europe, nationality is based on parentage, a principle which was recognized by the first Congress under the Constitution in the following words: 'The children of citizens of the United States that may be born beyond sea, or outside the limits of the United States, shall be considered as natural born citizens of the United States; provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States [Act of March 26, 1790, 1 Stat. 415] and the general sense of this provision has been continued in force to this day by succeeding legislation. [Act of February 10, 1855, 10 Stat. 604; R. S., sec. 1993; Act of March 2, 1907, 34 Stat. 1229; U.S. Code, Title 8,

sec. 6.] The question arises, whence did Congress obtain the power to enact such a measure? By the Constitution Congress is authorized to pass 'a uniform rule of naturalization,' that is, a uniform rule whereby *aliens* may be admitted to citizenship; while the provision under discussion purports to recognize a certain category of persons as citizens from and because of *birth.* Probably the provision is to be referred to the fact that Congress is the legislature of a nation which is sovereign at international law, and hence possesses the right of any sovereign nation in determining who shall be members of its body politic and who not. [In United States v. Wong Kim Ark, 169 U.S. 649 (1898), Justice Gray, speaking for the court, indicates quite clearly the opinion that the above legislation was passed under the 'naturalization' clause, and that children born abroad of American parents are therefore *naturalized* citizens; that, in short, to be a natural-born citizen of the United States one has to be born 'within the United States and subject to its jurisdiction.' (Ibid. 674, 702-703.) The point, however, was not involved in the case; nor does Justice Gray explain why Congress in the Act of 1855 'declares' children born abroad of American parents 'to be citizens of the United States.']"

As opposed to the dictum in the Wong case and to the three decisions based upon it, in addition to Professor Corwin and the other authorities cited above defining natural born citizens, there are the following authorities defining naturalized citizens as not including foreign born children of citizens;

Mr. Chief Justice Fuller and Mr. Justice Harlan in their dissenting opinion in the Wong case state "the children of our citizens born abroad were always natural-born citizens from the standpoint of this government (169 U.S. 649, 7014).

Johansen v. Staten Island Shipbuilding Co. (272 N.Y. 140, 1936) involved claims under the Workmen's Compensation Law, one brought on behalf of the decedent's widow and the other brought on behalf of the decedent's children. The facts surrounding the second claim were as follows: The claimants were children of the decedent and the widow. All of these children were born outside the United States. At the time of their birth their father, the deceased, was a naturalized citizen, and their mother had become a naturalized citizen by marriage. Therefore, the children were born abroad of parents both of whom were United States citizens. Here, the court held the award could not be commuted under the statutory provision for commuting Workmen's Compensation awards to aliens, since the children "were not naturalized citizens, but citizens by birth, though born without the United States."

The Nationality Laws of the United States (76th Cong., 1st Sess., 1938) contains the following two statements:

"Naturalization according to the usual acceptation of the term in the United States undoubtedly means the grant of new nationality to a natural person *after* birth." (Italics in original. p. 3).

"The term (naturalization) is not ordinarily applied to the conferring of the nationality of a state, jure sanguinis, at birth upon a child born abroad" (p. 3).

An example of the customary use of "naturalization" appears in the Immigration and Nationality Act of 1952, now in effect. Title 8, chapter 12, Subchapter III, contains two parts, Part 1 of which, dealing with 'nationality at birth,' includes (a) persons born in the United States, and also (b) persons born outside of the United States of parents, one of whom is a citizen, whereas Part 2 deals with 'nationality through naturalization.' The predecessor statutes to the Act of 1952 made the same distinction between persons who became citizens at birth and naturalized citizens. See also the quotation from Hackworth, supra.

It has been suggested that the Fourteenth Amendment should be construed as though it read that citizenship can be acquired *only* by birth in the United States or by naturalization in the United States. This construction is unsound. If it were correct it would prevent foreign-born children from being citizens at all, since they are neither born nor naturalized *in* the United States. This Amendment does not purport to enumerate all methods of acquiring citizenship or to apply to foreign-born children in any, as Justice Gray points out in his opinion in the Wong case, at page 688:

"This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—'born in the United States.' 'naturalized in the United States' and 'subject to the jurisdiction thereof'—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents."

Thus it is clear that the amendment in no way concerns itself with the status of foreign-born children, and furnishes no support whatsoever for the Wong dictum, which asserts that such children acquired citizenship by naturalization outside of the United States.

It is accordingly believed that the term "naturalized" applies only to aliens and not to those who are automatically citizens from birth, and that therefore foreign-born children of citizens, since they never were aliens and became citizens at birth

without any action on their part, cannot properly be termed naturalized, and that the dictum in Wong is wrong.

## VI

## Conclusion

It follows from the preceding that Governor Romney, who was a citizen of the United States from his birth by virtue of his parentage, is a natural-born citizen and therefore is eligible under the constitution to be elected to the office of President of the United States.

Furthermore, it is appropriate to call attention to the following quotation from Professor Corwin, in his The President, Office and Powers, at page 33, which in referring to the fourteen years' residence, is dealing with another requirement in the constitution for eligibility to the office of President.

"At any rate, should the American people ever choose for President a person born abroad of American parents, it is highly improbable that any other constitutional agency would venture to challenge their decision—a belief which is supported by the fact that Mr. Hoover's title to the Presidency was not so challenged; although he had not been fourteen years a resident of the United States immediately preceding his assumption of office."