Celler Urges Action Soon On Presidential Eligibility

By Emanuel Celler

Since last May, when I made my first observation about Governor Romney's constitutional eligibility to hold presidential office, several comments on both sides of the issue have been volunteered; some have been noteworthy for their scholarly objectivity, others transparent in their political motivation. Before going on to analyze the nature of the problem we face and to suggest some apparent remedies available through legislation and under existing law, I should like to make it perfectly clear that I personally do not claim the competence or the inclination to decide the question of the Governor's eligibility. I have raised the issue only because I have a deep and abiding concern as a lawyer and a congressman for the prevalence of that legal certainty which is the hallmark of a constitutional system of government.

Article II, section 1, clause 5, of the United States Constitution declares: "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 the Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."

Governor George Romney was born in Chihuahua, Mexico, in 1907 of American parents; it would appear that they had done nothing voluntarily or involuntarily to forfeit their American citizenship. Is the Governor then a "natural born" citizen within the meaning of this clause of the Constitution? Can the phrase "natural born citizen" be read to include children born abroad to American parents simply because a controlling nationality statute purports to make such children "citizens at birth"?

Depending upon the evaluation of many additional factors bearing upon this problem, the intent of the framers of the constitution in the light of the English common law, the Naturalization Act of 1790, the language of several subsequent nationality statutes, the citizenship clause of the Fourteenth Amendment, the decisional law in the general area, the opinions of the leading British and American publicists, one can quite respectably emerge with an answer on either side.

For instance, if one agrees that the framers were conditioned in their thinking by British nationality laws *and* that such laws were declarative of the common law, then it would appear that the presidential qualification clause of the United States

Constitution meant to include as eligible the foreign-born children of United States citizens.

On the other hand, if one regards the British nationality laws as making specific exceptions to established common law nationality principles, and if one further attributes this view to the framers, then the opposite conclusion would seem to be in order. I should hasten to add that the records of the Constitutional Convention of 1787 do not in any way disclose the intent of the Founding Fathers on the issue of presidential eligibility.

Similarly, if one reads the provisions of the Naturalization Act of 1790 in ipsis verbis ("And the children of citizens of the United States that may be born beyond the sea or out of the limits of the United States, shall be considered as natural born citizens of the United States"), one is tempted to conclude that citizens of the class under discussion are "natural born" for Article II purposes; read in terms of its caption as a "Naturalization Act," however, the statute would seem to manifest a congressional intent to *naturalize* a class of people who are not native or "natural born."

The language of the first section of the Fourteenth Amendment poses comparable dilemma. On its face, the Amendment purports to recognize two "classes" of citizens: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside."

Given the fact that the Congress of 1866 proposed this Amendment to facilitate a blanket award of citizenship to America's newly emancipated Negro's, should the two categories of citizenship be read inclusively or exclusively?

If read inclusively, then the possibility remains that children born abroad to American parents are, without benefit of naturalization, to be regarded (for the purposes of the presidential qualification clause) as constituting a third class of citizens completely on a par with those "born in the United States."

If read exclusively, these categories would almost force us to decide that the class in question becomes entitled to citizenship by naturalization only, and therefore that members of the class do not qualify to hold presidential office under Article II.

Construed either way, of course, the amendment does not purport to touch *directly* upon the presidential qualification clause. And finally it should be noted

that either construction begs the question of whether a citizen may be *both* naturalized *and* "natural born."

The landmark case interpreting section 1 of the Fourteenth Amendment is United States v. Wong Kin Ark (169 U. S. 649, 1898), but that interpretation does precious little to elucidate the question with which we are now dealing. There it was held that a child born in the United States to alien parents is a citizen of the United States and "subject to the jurisdiction thereof" under the so-called jus soli.

What does appear, at first glance, to be more germane to the issue here is the surplusage of dicta to be found in the majority and minority opinions. The dicta of the majority opinion (Mr. Justice Gray) enunciate the principle that in the Anglo-American jurisprudence the only basis for citizenship at birth is the jus soli: the minority opinion (Mr. Justice Fuller) argues almost as convincingly in dissent that the English common law as received in the United States combined the jus soli and the so-called jus sanguinis (citizenship by descent) with the result that equal status was accorded to all citizens' children whether born at home or abroad.

But which set of dicta is the more authoritative? Which set should govern? Supplementary American case law, antecedent or subsequent, and the work of noted publicists on both sides of the Atlantic tend simply to reinforce the web of doubt.

Nor is it of any help to turn to the Immigration and Nationality Act now in force. Section 301 (a) in clause 3, 4 and 7 extends citizenship at birth to the class in question, but what indicia are there of a congressional intent to clarify the meaning of the presidential qualification clause, let alone to equate "at birth" with "natural born" as it is employed in Article II? I am aware of no such indicia, whether in the plain language of the statute or in the legislative history.

In fact, as we approach our forty-fifth presidential election, the only thing that remains beyond doubt is that the language of the presidential qualification clause is doubtful. No legislation has ever dealt with it directly; no court, state or federal, has had the opportunity to pass upon it.

At this point, then, what remedies are possible or feasible? Theoretically, there are many; practically, there maybe only a few. My own discussion of them will make no pretense at exhaustiveness, nor will it demonstrate or insist upon the primacy of any one procedure; after all, in an area where no one has any *real* experience, bold insistence must be at the expense of prudence, and discretion must truly be the better part of valor.

As I see it, there are five, perhaps six, routes which might be traveled; two are legislative and three or four are adjudicative in nature. The legislative possibilities are perhaps the most readily apparent: (1) the Congress could put through a constitutional amendment which would speak with finality on the issue of presidential eligibility; previous efforts along that line, because they seemed to address themselves to a purely academic contingency, have been without success, but, of course, this does not preclude a renewed effort in the light of new facts.

In any event, political considerations to one side, the exigencies of the ratification process would prevent such an amendment from becoming the law of the land by November of 1968, unless some remarkably speedy and concerted action were forthcoming: (2) the Congress could pass legislation designed specifically to explain and supplement the presidential qualification clause; the greatest risk here (although it may finally be a risk inherent in all legislation even remotely ancillary to constitutional provisions) is the likelihood that the courts will not see fit to be bound by a congressional attempt to interpret the constitution.

The Judicial remedies are basically as follows: Those in the nature of declaratory judgment suits brought in state courts or in the federal courts under 28 U. S. C. 2201, those provided by state law where one seeks to challenge the determination of a state election official, those arising from titles 42 and 28 of the U. S. Code where jurisdiction is conferred on the federal District Courts to entertain suits for the protection of voting rights and other civil rights, and finally the common-law writ of quo warranto in its modern guise under Rule 81 of the Federal Rules of Civil Procedure.

Of the remedies enumerated, the least practical would seem to be the last. Since a writ of quo warranto would lie only *after* the President has assumed office, the courts, extremely reluctant to upset the ship of state on a constitutional "technicality," would probably hide behind the veil of non-justiciability ("political question") and thus refuse to decide the issue before them on the merits. Of course, non-justiciability could just as easily nullify a declaratory judgment action brought at the earliest possible stage of the electoral proceedings.

Again, the question raised could be deemed "political" or the standing of a citizen-plaintiff to sue could be denied; after all, the constitutional requirement of "case or controversy" applies just as well to declaratory judgment suits as it does to other forms of action brought in the federal courts. Nevertheless, in an era characterized by ever-increasing judicial concern for the establishment of constitutional justice in the electoral process, it seems safe to conclude that a

federal court would be less fetishistic about justiciability where suit was commenced at the first opportunity, say at the time that the disputed candidate's name was placed on the ballot in a preference primary.

To be sure, an easier situation would obtain if an action were brought by the candidate himself in an attempt to overturn a negative finding by state election officials on the issue of his eligibility. The same might be true if the challenge were to come from an opposition candidate (in the primary) to an official finding in support of the disputed candidate's eligibility.

Such actions would certainly be cognizable under operative state law in most states with eventual appeal or certiorari to the United States Supreme Court on the constitutional issue involved. 42 U. S. C. 1988 and 28 U. S. C. 1343 might also be brought into play for the purpose of vindicating the rights of the aggrieved candidate or citizen-voter, especially if he could demonstrate to the satisfaction of the United States District Court that he was without any other adequate remedy.

But even here, where a statute appears to afford direct relief, timing strikes me as being *the* essential factor. A challenge to a presidential candidate made after his party's nominating convention or after the electoral college has convened could intimidate even the most upright and courageous members of the judiciary; they would doubtless feel justified in retreating before the will of the people.

Despite the fact that this matter has no easy solution, I am confident that if Governor Romney becomes a candidate, someone who shares my interest in constitutional government will actively seek a judicial clarification of this problem.