Is Gov. George Romney Eligible to Be President? Part 1

By Isidor Blum

"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; nor 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."

Does this provision in Article II, section 1, of the Constitution exclude from the office of President one who was born to American parents in a foreign country and who, under a statute providing for such cases, became a citizen at birth?

Governor George Romney of Michigan was born July 8, 1907, in Chihuahua, Mexico, where his parents, who were citizens of the United States, were then residing. They later returned to the United States and he attended school and college in this country.

At the time of Governor Romney's birth the following statutory provision was in force:

"All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be at the time of their birth citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. All such children who continue to reside out of the United States shall, in order to receive the protection of this Government, be 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 shall be further required to take the oath of allegiance to the United States upon attaining their majority." Act of March 2, 1907. C.2534, 34 Stat. 1229.

Under this provision Governor Romney has been a citizen of the United States since his birth. But is he a "natural born citizen" within the meaning of the requirement in the Constitution?

The answer would seem to be that he is not a natural born citizen, but is a naturalized citizen.

This conclusion is based on an inquiry into what was meant by the words "natural born citizen" when the Constitution was framed and adopted and on the

statement in the Fourteenth Amendment that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

The Constitution contains no definition of "natural born citizen." Nor did the framers define the word "citizen," which is used also in Article I, III and IV.

We can be sure that the phrase "natural born citizen" was not loosely used. It has often been remarked that the framers of the Constitution were precise in their language. The phrase "natural born" had long been used in Great Britain and had been used also in America. It was a legal term.

As in the case of other legal terms in the Constitution, we must for the meaning of "natural born" resort to the common law, "with the nomenclature of which the framers of the Constitution were familiar." Minor v. Happersett (1875), 21 Wall, 162, 167.

The provisions of the Constitution "are framed in the language of the common law and are to be read in the light of its history." Smith v. Alabama (1888), 124 U.S. 465, 478. "The language of the Constitution and of many acts of Congress could not be understood without reference to the common law." Moore v. United States (1875), 91 U. S. 270, 274.

Inquiry into the meaning of "natural born citizen" will involve, among other things, references to the basic and history in England and Great Britain and in the United States, of what we today call "nationality" and a scrutiny of acts of Parliament and acts of early Congresses concerning children born in foreign countries to British subjects and to American citizens.

"Citizenship is membership in a political society and imposes a duty of allegiance on the part of the member and a duty of protection on the part of society. These are reciprocal obligations, one being a compensation for the other." Luria v. United States (1913), 231 U. S. 9, 22.

Who shall be citizens of a nation is wholly a matter of municipal law. It is "the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to citizenship." United States v. Wong Kim Ark (1898), 169 U. S. 649, 648. Questions of citizenship have, however, given rise to international disputes and have been dealt with in treaties.

Citizenship may be acquired by birth or by naturalization. Naturalization has been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." Boyd v. Nebraska ex rel. Thayer (1892), 143 U. S. 135, 162.

There are in the world's legal systems two theories or doctrines concerning citizenship, or nationality, by birth. One of these, which is called "jus sanguinis," is that, no matter where a person is born, his nationality is that of his parents or of one of them.

The other doctrine, which is called "jus soli," is that, whatever a person's lineage, he is a national of the country in whose territory he is born. This is subject to two exceptions, or qualifications. A child of an ambassador, born in the country to which the father is accredited, is not a national of that country. Nor is a child that is born to an alien enemy in enemy occupied territory of a country a national of that country. These exceptions are explained in The Exchange (1812), 7 Cr. 116, and in United States v. Rice (1819), 4 Wheat 246.

Most nations have some features of each of the two doctrines, with one or the other predominating. In France, where jus sanguinis has been the primary doctrine since the Code Napoleon on 1807, the statute now in force provides that a legitimate child of a French father shall be French, and it then spells out various situations in which other children, if born in France, may be French.

Our statute, 8 U. S. C., section 1401, in conformity with the jus soli doctrine, declares, almost verbatim in the language of the Fourteenth Amendment, that "a person born in the United States, and subject to the jurisdiction thereof," is a "national and citizen of the United States," and it then enumerates categories of persons who, though not born here, may by reason of parentage be citizens or nationals of the United States at birth.

What is called dual or double nationality may arise from the conflicting operation of different laws. Thus, a person born in one country to citizens of another country may be able to elect to which he will adhere. But the nation that he does not choose may be able, if he is in its territory, to hold him to the obligations of a citizen.

Conflict may arise also if a nation to which a person has owed allegiance refuses to regard this as terminated by his naturalization in another country. One of the causes of the War of 1812 was the impressment by British naval vessels of merchant seamen who were born in Great Britain and who had become naturalized

American citizens. See, as to dual nationality, Kawakita v. United States (1952), 343 U. S. 717, 733-737; United States v. Wong Kim Ark (1898), 169 U. S. 649, 671-672; Van Dyne, Citizenship of the United States (1904), 283 et seq.; Borchard, Diplomatic Protection of American Citizens Abroad 1915), passim.

Early law was tribal rather than territorial law. It laid more stress on lineage than on place of birth or on where one dwelt. A man carried his law with him. That concept, which characterized early Germanic law, prevailed in most of Western Europe after the Roman Empire was overthrown and the invaders from the North settled tribe after tribe in the territory that Rome had ruled.

Each tribe had its own law. Romans and the various groups of invaders, living together in the same cities or places, had their own ways and their separate laws, much as Hindus, Moslems and Europeans later had in India their own family and religious laws, by which their status and rights were largely governed. After several centuries, this system gave way in Italy with the rise of the city states. North of the Alps it gave way with the rise of the feudal system. Cheshire, Private International Law, 5th ed. (1957), 21; 9 Holdsworth, History of English Law (1938), 73.

Fealty of the vassal to his lord and the latter's obligation to protect his vassal were in feudal England a condition of land tenure. Related, but different, was the allegiance owed to the king, the lord paramount, by all persons in the kingdom.

Thus, it seems, arose the doctrine, or rule of law, that everyone who was born within the king's dominions, or, in the language of the old law books, within the ligeance of the king, was a subject of the king.

The rule was a rule of the common law, Coke on Littleton (1628), 8a. 128b, 129a, 129b, the common law that governed also in the British colonies in North America and, when they became independent, was adopted by the states which later formed the Union.

Was it also a rule of the common law that children born to English subjects in a foreign country were subjects of the king?

The answer to this question, which has a direct bearing on the question raised in the title page, has turned largely on whether an act of Parliament of the year 1350 was declaratory of the common law or established a new rule.

In the Rolls of Parliament of the 17th year of Edward III (1343) it is recorded that there had been "great doubt and difficulty among the lords of this realm and the

commons, as well men of the law as others, whether children who are born beyond sea ought to bear inheritance after the death of their ancestors in England, because no certain law had been thereon ordained," and by the King, lords and commons it was unanimously agreed that "the children of the King, whether born on this side of the sea or beyond the sea, should bear the inheritance of their ancestors," and "in regard to other children, it was agreed in this Parliament, that they should also inherit wherever they might be born in the service of the King." 2 Rot. Parl. 139, quoted in United States v. Wong Kim Ark (1898) 169 U. S. 649, 668.

But because the Parliament was about to depart, "and the business demanded great advisement and good deliberation how it should be best and most surely done," the making of a statute was put off to the next Parliament.

The Black Death intervened, and it was not until 1350 that Parliament enacted a statute which was intended to resolve doubts and over whose interpretation two American courts five hundred year later disagreed.

This statute of 25 Edw. 3 contained three provisions. The third of these was that "all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come, so always that the mothers of such children do pass the sea by the license and will of their husbands."

Lord Chief Justice Kenyon said in 1791 that he could not "conceive that the legislature in passing that Act meant to stop short in conferring the right of inheritance merely on such children, but that they intended to confer on them all the rights of natural-born subjects." Doe v. Jones (K. B., 1791), 4 T. R. 300, 308, 100 E. R. 1031, 1035.

Was this enactment declaratory of the common law, or did it, on the contrary, establish a new law?

The New York Court of Appeals in Ludlam v. Ludlam (1863), 26 N. Y. 356, in an opinion in which Judge Selden examined English history and early English decisions, held that this provision was merely declaratory of the common law and, interpreting the word "citizen" with reference to what it thus found to be a principle of the common law, it held that, although there was no statute applicable to the case, a child born in a foreign country to an American father was a citizen of the United States.

On the other hand, the Supreme Court of the United States in United States v. Wong Kim Ark (1898), 169 U. S. 649, in an opinion in which Justice Gray cited an array of authority, concluded that this provision in the statute of 25 Edw. 3 established a new rule.

Sir Alex. Cockburn, Lord Chief Justice of England, alluded to the statute in a monograph that he wrote in 1869 under the title "Nationality, or the Laws Relating to Subjects and Aliens Considered with the View to Future Legislation." Concerning statements that the provision was declaratory of the common law, he said:

"But this view is hardly consistent with its language, which is prospective, and refers only to children which from henceforth shall be born; and it has been pertinently observed that if the statute had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary." P. 9.

The phrase "natural born subject" recurs again and again in this subsequent legislation. What did the phrase mean?

"Natural born" meant at that time precisely what we mean today by native-born.

The Oxford English Dictionary gives twelve definitions for the word "natural" used as a noun. The first of these definitions reads: A native of a place or country. *Obs.* (very common c. 1580-1650)."

In a supplemental volume there is an example of the use of the word in this sense in America in 1748: "I have taken wife—like a good Christian and am become a Natural of the country or county born as some call themselves."

Three centuries after the statute of 25 Edw. 3, Parliament was again concerned with the rights of children born beyond the sea. In 1677, seventeen years after Bonnie Prince Charlie's return to England and the restoration of the monarchy, Parliament enacted, in 29 Car. 2, c. 6, a statute entitled "An Act for the Naturalization of Children of His Majesty's Subjects Born in Foreign Countries During the late Troubles."

By the terms of this statute, four persons who are named, others who may be named by the King, and all other persons who between June 14, 1641, and March 24, 1660, "were born out of his Majesty's dominions and whose fathers or mothers were natural born subjects of this realm are hereby declared and shall forever be esteemed and taken to all intents and purposes to be and to have been the King's

natural born subjects of this kingdom" and "are and shall be adjudged, reputed and taken to be and to have been in every respect and degree natural born subjects and free to all intents, purposes and constructions as if they and every one of them had been born in England."

In 1698, by 11 Wm. 3, c. 6, it was enacted that natural born subjects should be entitled to inherit from any of their ancestors although their fathers or mothers or other ancestors from or through whom they derived title were born out of the King's allegiance and realm [and thus were not entitled to inherit]. They should be able to make or derive their titles, the statute said, as freely and effectually as though the parent or other ancestor through or under whom title was derived had been a naturalized or natural born subject within the King's dominions.

Ten years later, in 7 Anne, c. 5, entitled "An Act for Naturalizing Foreign Protestants," it was provided that foreigners of the Protestant or Reformed religion, born out of the ligeance of her Majesty or of her successors, should on taking an oath and subscribing a declaration "be deemed, adjudged, and taken to be her Majesty's natural born subjects of this kingdom to all intents, construction, and purposes as if they and every one of them had been or were born within this kingdom."

And in the same statute it was further enacted that "the children of all natural born subjects born out of the ligeance of her Majesty, her heirs and successors shall be deemed, adjudged, and taken to be natural born subjects of this kingdom to all intents, constructions and purposes whatsoever."

Some doubts having arisen concerning the construction of this provision, a new statute was enacted in 1731, 4 Geo. 2, c. 21, which provided that all children born out of the ligeance of the Crown, whose fathers were or shall be natural-born subjects of the Crown at the time of the birth of such children, "shall and may, by virtue of the said recited clause in the said act" of 7 Anne "and of this present act, be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects of the Crown of Great Britain, to all intents, constructions and purposes whatsoever."

These statutes, in respect both of foreigners coming to Great Britain and of foreign-born children of British subjects, were related to the growth of British commerce. In Geo. 3, c. 21 (1773), it was recited that "divers natural-born subjects of Great Britain,…though various lawful causes, especially for the carrying on of commerce, have been, and are, obliged to reside in several trading cities and other foreign places where they have contracted marriages and brought up families;

and…it is equally just and expedient that this kingdom should not be deprived of such subjects, nor lose the benefits of the wealth that they have acquired."

British nationality was, accordingly, conferred by this statute on an additional generation. All persons born out of the ligeance of the Crown, the statute provided, "whose fathers were or shall be, by virtue of" the statute of 4 Geo. 4 entitled to all the rights and privileges of natural-born subjects of the Crown…shall and may be adjudged and taken to be, and are hereby declared and enacted to be, natural-born subjects of the Crown of Great Britain, to all intents and purposes whatsoever, as if he and they had been born in this kingdom."

The meaning and effect of the statute are evident from their language as well as from their titles. Parliament could not alter the fact that the children described in them were born abroad. What it could deal with was the effect of their having been born abroad. It did this by saying that they should be adjudged and esteemed and taken to be, and they hereby declared and enacted to be, natural born. British subjects to all intents and purposes as if they "had been born or were born within this kingdom.

Except that it was somewhat more verbose, the language used is similar to that which Parliament used in enacting in the statute of Anne 7 that foreigners, on taking an oath and subscribing a declaration should be "deemed and taken to be" natural-born subjects to all intents and purposes as if they had been born within the kingdom.

Persons in both categories became British subjects by Naturalization.

There still was a difference between British subjects who were born in Great Britain and their children who were born abroad and were to be deemed and taken to be natural-born subjects as if born in Great Britain. Until 1773 the statutes applied only to foreign-born children whose fathers were in fact, and not simply declared to be, natural-born British Subjects. The act of 1773 applied also to foreign-born children of these foreign-born children. But, as Dicey put it in his treaties on Conflict of Laws, British nationality "did not pass by descent or inheritance beyond the second generation."

Our statutes have required that a parent through whom a foreign-born child is a citizen shall have resided in the United States before the child's birth.

Blackstone, speaking of naturalization by special act of Parliament, said that "by this an alien is put in exactly the same state as if he had been born in the king's

ligeance; except only that he is incapable…of being a member of the privy council, or parliament, holding offices, grants, &c. No bill of naturalization can be received in either house of parliament without such disability clause in it…" 1 Comm. (1765), 74, citing 12 Wm. 3, c. 3, and Geo. 1, c. 4. See also Hansard, The Law Relating to Aliens (1844) 198, and Piggott, Nationality (1907), 99.

Lord Chancellor Eldon, in Shedden v. Patrick (1803), 1 Macq. 535, 611, said in the House of Lords: "I need not state to your Lordship that, independently of statute, every one born abroad is an alien. I state the proposition perhaps too generally, because the children of ambassadors and some other persons were excepted; but as a general proposition, all persons born abroad were aliens. That state of the law was interfered with [by statute]….

"In the reign of Queen Anne it was enacted by a statute passed for "naturalizing foreign Protestants,' that 'the children of all natural-born subjects born out of the ligeance of Her Majesty should be deemed, adjudged, and taken to be natural-born subjects of this kingdom."

Dicey in his treatise on Conflict of Laws said: "English lawyers in the time of Edward III based the law of what we should now call 'British nationality' on one broad principle, which they firmly upheld both from its positive and from its negative side. Any person, they held, who was born within the ligeance of the King of England was a natural-born British subject, whilst, on the other hand, no person was such a natural-born British subject unless he was born within the ligeance of the King." 2d ed. (1908), 708.

All of this, or at least its essence, and that "natural" meant "native", was well understood by the framers of the Constitution. It was, for one thing, clearly stated by Blackstone in his Commentaries on the Laws of England.

Blackstone had for several generations an extraordinary vogue and influence in America. Copies of his Commentaries were imported immediately after their publication in England in 1765 and 1768. An edition was published in Philadelphia in 1771 and 1772, and another was published in Worcester, Massachusetts, in 1790. Edmund Burke during the American Revolution told the Commons that more copies of Blackstone were brought in America than in Great Britain. It was the principle book, and often the only book, to be found in a lawyer's office or used by a law student. Nor was it read only by lawyers and law students.

Americans did not subscribe to Blackstone's exaltation of the British monarchy, but they drew on him in their assertions of their legal rights as British subjects and later in the drafting of the Constitution.

In a chapter entitled "Of the People, Whether Aliens, Denizens, or Natives," Blackstone wrote:

"The first and most obvious division of the people is into aliens and natural-born subjects are such as are born within the dominions of the crown of England;…and aliens are such as are born out of it." 1 Commentaries, 366.

"When I say that an alien is one who is born out of the King's dominions," Blackstone further wrote, "this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions, so that a particular act of parliament [29 Car. 2, c. 6] became necessary after the restoration, 'for the naturalization of the children of his majesty's subjects, born in foreign countries during the late troubles.'" Id., 373.

Additional pronouncements that bear on the meaning of "natural born" are collated, and other relevant material presented, in a well-researched article by Pinckney G. McElwee, entitled "Natural Born Citizens," 113 Congressional Record, H7255 (daily ed., June 14, 1967).

In the Federal Convention of 1787, a draft was presented on August 22 in which the President was required to be "a citizen of the United States and an inhabitant thereof for twenty-one years." In the draft presented September 4, the term "natural born citizen" was used.

Farrand's comprehensive "The Records of the Federal Government of 1787" (1911) discloses no debate or discussion concerning the change nor anything said on the subject except for a letter of John Jay to George Washington, dated July 25, 1787, in which Jay wrote, "Permit me to hint whether it would not be wise…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 word "born" was emphasized.) Washington, who was President of the Convention, in a letter dated September 2, thanked Jay "for the hints contained in your letter."

Expressions, however, that were used in another context indicate what the delegates meant by "natural born citizen."

On August 9, when qualifications for Senator were discussed, George Mason and Benjamin Franklin expressed opposition to restricting that office to "natives."

Four days later, when there was debate concerning the qualifications for Representatives, Elbridge Gerry is reported in Madison's Notes to have "wished that in future the eligibility might be limited to natives." Madison, Nathaniel Gorham and Gouverneur Morris took a contrary position, but used the same word, "natives."

If the delegates used the word "native" in their debates, why did not the Committee of Style, in whose work Gouverneur Morris had a leading part, use that word in the Constitution? The answer may be that, while "native" might do well enough in colloquial use or in debate, "natural born" was a legal term that had long been used in English statutes and decisions, and had been used in America as well, and was the appropriate term for use in the Constitution. Legal draftsmen tend, and properly so, to use expressions that have acquired a definite and established meaning in the law.

"Native-born" appears to have been used but little, if at all, in a legal context. The earliest instance that this writer has come across is in McCreery's Lessee v. Somerville (1824), 9 Wheat, 354.

In the New York Constitutional Convention of 1821, a delegate proposed that the Governor be required to be a "natural-born citizen of the United States." Eleven days later the delegates approved a resolution that he must be a "native-born citizen." In the Constitution in its final form as it was adopted, the Governor was required to be a "native citizen of the United States." Evidently, to these delegates, as to those of 1787, "natural-born" and "native" meant one and the same thing.